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A TREATISE

ON THE

LAW OF PARTNERSHIP

AND

JOINT-STOCK COMPANIES,

ACCORDING TO

THE LAW OF SCOTLAND.

MURRAY AND GIBB, PRINTERS, EDINBURGH.

A TREATISE

ON THE

LAW OF PARTNERSHIP

AND

JOINT-STOCK COMPANIES,

ACCORDING TO THE LAW OF SCOTLAND,

INCLUDING

PRIVATE COPARTNERIES, COMMON LAW COMPANIES, REGISTERED COMPANIES, CHARTERED COMPANIES, RAILWAY COMPANIES, AND OTHERS, FORMED UNDER THE CONSOLIDATION ACTS.

BY

FRANCIS WILLIAM CLARK,
ADVOCATE.

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TO THE

RIGHT HONOURABLE DUNCAN M'NEILL,

OF COLONSAY,

LORD JUSTICE-GENERAL OF SCOTLAND,

This Treatise

ON

PARTNERSHIP AND JOINT-STOCK COMPANIES

IS,

WITH HIS LORDSHIP'S KIND PERMISSION,

RESPECTFULLY INSCRIBED.

PREFACE.

My design in the present Treatise is to investigate the principles of the Scottish law of Society, in so far as they are applicable to associations formed for purposes of mercantile gain; and to trace their practical working in the private copartnery, in the public company existing at common law, and in the corporation created by Royal Charter, by Registration, or by Special Act.

The systems of partnership law existing in England and Scotland respectively, discover, when properly understood, the same underlying principles of equity, and in the general case eventuate in similar practical results. It is obvious, however, on the most cursory examination, that the theory of each is essentially different, —the Scottish system prominently recognising, the English system entirely ignoring, a *quasi* person in unincorporated associations however large. The consequence is, that while the English authorities, so much more numerous than our own, form valuable precedents in Scottish practice, their indiscriminate use is fraught with great danger, and has unquestionably tended to obscure the simplicity and artistic beauty which characterize the Scottish law of society. Throughout the present work I have endeavoured to trace out and bring into prominent notice this fundamental distinction, and to show in what respects it produces a mere variance in phraseology, and in what cases it creates a difference in legal principle or in matter of remedy. To accomplish this object in a way commensurate with its importance, would necessitate an acquaintance with English law for which the mere theoretical study of that system is a very inadequate preparation. I have sought to compensate for the disadvantages under which, in this respect, I have

laboured, by appending to each statement in the text a full list of the authorities on which it is based, and of which it is presented as the exponent.

In treating of the law of incorporated associations, I have also been careful to notice what have been deemed differential characteristics between the two legal systems. In many respects, I am inclined to believe that these apparent points of contrariety have been unduly exaggerated, from a misconception of the technical phraseology employed, or from founding on certain usages which were common and perhaps legal prior to the Union, but which appear to be no longer precedents since the Constitution has settled into its existing form.

The Consolidation Acts will be found reviewed at considerable length, and illustrated by authorities taken both from English and Scottish law.

The importance of railway law has induced me to treat of it in great detail. I have endeavoured to bring under review all the existing public statutes bearing upon this subject in the law of Scotland, and have also referred to the corresponding English Acts.

The provisions of the Registration Act of 1862 occupy a considerable portion of the work; and it is hoped that the chapters on winding up will be found to contain all the more important authorities.

Considerable attention has been given to the law of companies formed by royal charter; and this has necessitated a general examination of the Letters Patent Acts.

The Appendix will be found to contain a collection of forms. Those applicable to articles of copartnery are intended more as suggestions than as precedents,—their primary object being to indicate the principles upon which such contracts should be framed, and the meaning and effect of the ordinary provisions.

There has also been annexed a reprint of all the more important Statutes applicable to partnership and joint-stock companies in Scotland. It is hoped that this will supply a want which, from the scattered nature of such enactments, has long been felt.

The subject-matter of the work being very extensive, every effort has been made to study brevity and compression. With this

view, all quotations from opinions or *dicta* have, except in rare instances, been dispensed with; but while what is conceived to be their import has been stated in the text as succinctly as possible, the authorities themselves will always be found appended in the notes below. The plan of treatment may be thought deficient in symmetry and in order of sequence; nor is it such as I should have chosen if I had been less studious of compression. It is not the form in which the Treatise was originally cast; but was adopted after many others had been tried and abandoned, as it seemed best calculated to avoid repetition or cross reference. I should also mention that, while the manuscript was passing through the press, some important statutory alterations were made on the law, and these I deemed it better to incorporate in the text than to notice in the Appendix.

While engaged in collecting materials for the present work, nothing has so much arrested my attention as the immense superiority which the Scottish theory of the private partnership and unincorporated company possesses over that adopted, or rather contended with, in England; and while observing that the principle of the separate *persona* has been adopted by the imperial Legislature in the registration statutes, whose enactment the admitted imperfections of the English theory of partnership had rendered necessary, I have often felt surprise and disappointment that no writer on English law appears to have been even aware that this very principle has for ages formed an integral part of the Scottish law of partnership, in which indeed it received still greater prominence at a period when English precedents were little known or regarded. In this as in many other branches of commercial law, and in none more than in that of bankruptcy, it humbly appears to me that the imperial Legislature would find the usages of Scotland presenting much more valuable precedents than any system of foreign jurisprudence is calculated to afford.

But while entertaining an excusable predilection for those characteristic features of Scottish law, which must be appreciated as soon as they are understood, I am very far from undervaluing the intrinsic excellence of the laws of England; and, indeed, I cannot help regarding it as a very great defect in our system of legal education, that a course of English law forms no part of the curriculum.

The law of Rome has been described as a system of written reason; the Code Napoleon is probably unrivalled for simplicity, precision, and homogeneity; the laws of England appear to me to possess the proud distinction of insensibly but surely educating the people for the exercise and maintenance of their political rights, by familiarizing them, through the medium of the ordinary administration of justice, with those great principles of constitutional law, of which the British form of government is the most perfect embodiment which the world has yet seen. The English common law may be characterized as the application of the principles of the British constitution to the affairs of men in every-day life; or, as it may be otherwise expressed, the principles of the British constitution are those of the common law seen at a great angle. It is from considerations such as these that the laws of England, so little understood or appreciated by foreign jurists, receive their highest and most complete vindication.

In the preparation of this work I have received very great benefit from the labours of others who have treated of the same or of similar branches of law. In Scottish law, the Commentaries of Professor Bell, Mr Stark's work on Partnership, and the late Mr Henderson's Notes on Joint-stock Companies, have proved valuable aids. In the law of England, I must specially refer to the treatise of Mr Lindley,—a work which, I believe, stands unequalled for industry, erudition, and legal acumen, and whose sterling qualities can perhaps only be fully appreciated by one who has laboured in a similar field. The work of Sir William Hodge on Railway Law has been of great use to me in treating of that branch of the subject. Besides these, there are many other writers on English and American law, by whose labours I have greatly benefited. They are mentioned in the List of Authorities.

To my brethren of the Bar, and also to many gentlemen in other branches of the profession, I must return my grateful thanks for the valuable assistance they have at all times given, and for the many useful suggestions they have made during the progress of the work. To Mr William Guthrie, Advocate, I am under great obligations. He carefully revised all the references, pointed out several oversights, and made many important suggestions, particularly in reference to foreign and international law.

In the citation of authorities and decided cases, the following general principles have been adopted. I have endeavoured to cite all the Scottish cases which bear directly on the matter immediately under consideration, and reference is often made to many others which may be found useful as illustrative of the principles involved. The *embarras de richesse* presented by the English authorities rendered it necessary to make a selection. In doing this, I have endeavoured to choose, in the first place, the more leading cases; and where, as often happened, even these appeared too numerous for reference, I gave the preference to such as were of most recent date, contained the greatest number of references to other cases, and were least liable to the objection of proceeding on principles or technical rules peculiar to the English system. When the matter under consideration is regulated by a British Act, or by enactments substantially the same in both countries—*e.g.* the Registration Act of 1862, or the Consolidation Acts of 1845—the English authorities have been quoted with great fulness, and without any effort at selection.

In dealing with the English authorities, I have endeavoured to avoid the use of technical expressions, and have generally succeeded in expressing their import in ordinary language. Sometimes, however, the employment of phrases peculiar to that system was unavoidable. In such cases, the explanation will generally be found in the immediate context; but to provide against any oversight which may have occurred in this matter, the Index of Subjects will be found to contain the Scotch equivalents, or a brief explanation of such English words or phrases as are of most common occurrence in partnership law. It is hoped that this may also be found useful, if the reader (as I have to request he may) will consult the English authorities and reported cases to which throughout the Treatise he will find a continual reference.

Appended to the Index of Cases, there will be found a Table of all the Authorities and Collections of Reports to which reference is made throughout the work, or which I have had occasion to consult in the course of its preparation. To each is prefixed the customary abbreviation, unfamiliarity with which, when perusing English law works, sometimes creates considerable embarrassment. I have endeavoured to make this table as comprehensive as possible, so that it may be found useful not only to those who consult the

present Treatise, but to such as may be induced to extend their acquaintance with the subject by the perusal of the works of English and American jurists.

In conclusion, I must observe, that though the present Treatise has been the work of many years, and has been more than once almost entirely re-written, it is still very far from doing justice to the subject, and may easily be made the object of adverse criticism. When, indeed, I contrast the design with the performance, I am painfully conscious of how much the latter falls short of the former; nor can I doubt that, with all the industry I have had it in my power to bestow, several Scottish decisions of importance may have escaped my notice, that numerous valuable *dicta* to be found in cases not having an *ex facie* bearing on partnership law have been overlooked, and that the text itself may be chargeable with misstatements of law. Such considerations strongly suggest the propriety of soliciting the indulgent consideration of the profession, when the result of my labours is now finally submitted to their scrutiny.

FRAS. W. CLARK.

EDINBURGH, 5 FORTH STREET,
April 1866.

CONTENTS.

INTRODUCTION,

PAGE

Containing an Historical Sketch of the Law of Partnership and Joint-stock Companies in Scotland, and explaining the Objects and Plan of the Treatise, ... 1
Unincorporated Companies, ... 3
Companies incorporated by Act of Parliament, Royal Charter, or Registration, ... 6
Winding-up Acts, ... 10
Consolidation Acts, ... 10

BOOK I.

CONSTITUTION OF SOCIETY.

CHAP. I. For what purposes Society may be constituted, and what Partnerships or Companies are illegal, . . 17
II. Who are capable of contracting and sustaining the Society Relation, ... 22
III. Of Partnerships and Corporations, and their differential Characteristics, ... 29
Private Partnership, ... 30
Corporations, ... 32
IV. Of the Forms assumed in Scotland by Associations constituted for pecuniary Profit, . . . 40
SEC. 1. Private Partnerships and Common Law Companies, ... 40
SEC. 2. Companies erected by Public Authority, but not vested with full Corporation Privileges, 41
SEC. 3. Proper Corporations, ... 42
SEC. 4. Corporations with peculiar Privileges and aggressive Powers, ... 42
V. Formation of the Partnership relation in private Copartneries and Common Law Companies, . . 43
Constitution of Partnership proper, . . . 46
VI. Of *quasi* Partners, or Persons who incur Liability to the Public, though not Partners, . . . 52

PAGE

CHAP. VII. Difference between a formed and a contemplated Partnership, ... 61
VIII. Evidence of Partnership, ... 64
IX. Different kinds of Partners, ... 67
X. Public Companies, ... 69
Preliminaries to Formation, ... 69
Promoters, ... 75
XI. Formation of Registered Companies under the Act 1862, 86
SEC. 1. Companies limited by Shares, . . 87
SEC. 2. Companies limited by Guarantee, . . 87
SEC. 3. Companies with unlimited Liability, . . 88
General Rules applicable to the Three Kinds of Companies, ... 89
Application of the Act to Companies already existing, ... 91
XII. Formation of Companies by Royal Charter and Letters Patent, ... 96
SEC. 1. Chartered Companies, ... 97
SEC. 2. Letters Patent Companies, . . . 100
XIII. Formation of Companies under the Companies Clauses Consolidation (Scotland) Act, 1845, . . 102

BOOK II.

CONSTITUTION AND MANAGEMENT OF PARTNERSHIPS AND COMPANIES.

CHAP. I. General Rules, ... 107
Companies, ... 108
II. Constitution and Management of Companies registered under the Act of 1862, ... 112
III. Constitution and Management of Companies formed by Royal Charter and Letters Patent, . . . 119
IV. Constitution and Management of Companies formed under the Companies Clauses Act, 1845, . . . 123
Appointment of Directors, ... 125
Powers of Directors, ... 127
Proceedings of Directors, ... 127
Auditors, ... 129
V. Capital of Companies, and its Division into Shares, . 132
SEC. 1. Shares in Partnerships, . . . 135
Shares in Companies, ... 137
Consolidated Stock, ... 139
SEC. 2. Transfer of Shares, ... 141
SEC. 3. Retirement and Surrender of Shares, . . 151
SEC. 4. Expulsion of Members and Forfeiture of Shares, 153
VI. Calls, ... 157
SEC. 1. Mode of making Calls, . . . 157
SEC. 2. Liability for Calls, ... 161

PAGE

CHAP. VII. Company or Partnership Property, . . . 168
Conveyance and Vesting of Company Property, . 168
Company Property as distinguished from Separate Estate, ... 171
Conversion of Company Property into Separate Estate, 177
Nature of Partnership Property, . . . 178
Property held by Corporations, . . . 179
VIII. Duties of Partners towards the Company and each other, 182
IX. Powers of Majorities, ... 186
X. Powers of Partners, ... 179
XI. Powers and Duties of Directors, ... 203
XII. Powers of Partners, Directors, and other Officials, . 212
Buying and Selling, ... 212
Leasing, ... 215
Borrowing, ... 215
Pledging, ... 220
Mortgaging, ... 220
Bills and Notes, ... 229
Bank Cheques, ... 236
Guarantee and Suretyship, ... 236
Lending, ... 238
Letting and Hiring, ... 238
Insurance, ... 239
XIII. Constitution of Company Obligations, . . . 241
SEC. 1. Obligations arising from Contract and *quasi* Contract, ... 241
Modes in which the Company is bound, . 242
Damages for Non-fulfilment of Contracts, . 251
SEC. 2. Obligations arising from Delict and *quasi* Delict, 252
False Representations made to induce a Person to become a Partner, . . . 256
Criminal Acts, ... 262
XIV. Extinction of Company Obligations, . . . 265
SEC. 1. Actual Fulfilment, ... 265
Application of indefinite Payments, . . 266
SEC. 2. Virtual Fulfilment, ... 270
(1.) Compensation, ... 270
In Companies and Firms unincorporate, 270
In the case of Incorporated Companies, 271
(2.) Delegation and Novation, . . 271
SEC. 3. Release—Discharge by Creditor, and by Operation of Law, ... 275
SEC. 4. Presumed Abandonment or Satisfaction, . 279
Prescription or Limitation, . . . 279
XV. Liabilities of Partners and Shareholders for the Company Obligations, ... 284
Unlimited Liability of Partners and Shareholders in Firms and Unincorporated Associations, . . 286
XVI. Commencement of the Liability of Partners for Company Debts and Obligations, ... 292

PAGE

CHAP. XVII. Continuance and Extinction of Liability of Partners, etc., for Company Obligations, . . . 306
SEC. 1. Termination of Liability of Partners for Company Obligations already incurred, . 307
Termination of a Partner's Liability to be made responsible for the future Acts of the Company, ... 308
(1.) Dissolution by Death, . . . 311
(2.) Dissolution by Bankruptcy, . . 312
(3.) Retirement of dormant Partners, . 314
SEC. 2. Cases of continuing Liability to be made responsible for Company Obligations contracted subsequently to Dissolution or Retirement with Notice, . . . 315
XVIII. Liability of Members or Shareholders for the Debts and Obligations of Incorporated Companies, . . 319
XIX. Liability of Trustees holding Shares in a Partnership or Company, ... 326
XX. Liabilities of Partners and Directors considered as Agents and Trustees for the Company, . . . 329
SEC. 1. Liabilities of Partners, . . . 329
SEC. 2. Liabilities of Directors, . . . 333

BOOK III.

RIGHTS AND OBLIGATIONS OF PARTNERS AND COMPANIES.

CHAP. I. Preliminary, ... 337
II. General View of the Rights and Obligations of Partners and Shareholders in relation to the Company, to each other, and to the Public, . . . 341
SEC. 1. *Inter socios*, ... 341
SEC. 2. In Questions with the Public, . . . 348
III. Rights and Obligations of Companies, . . . 351
Rights and Obligations in relation to Formation, . 351
Right to dispose of Company Property, . . 357
Rights and Obligations in Suretyship and Guarantee, 358
Contracts of Service, ... 361
Holding Property, and corresponding Rights and Obligations, ... 364
Rights and Obligations under Contracts, . . 365
Competition of Rights, ... 366
Obligations of Companies to their Partners, . . 369
Bills and Notes, ... 370
Extinction of Company Rights and Obligations, . 374
Prescription, ... 374
Right to Interdict, ... 375
Public Burdens, ... 375

PAGE

CHAP. IV. Right to share Profits and Dividends, . . . 377
Public Companies, ... 382
V. Right to share in Management, ... 386
Right to inspect Company Books, . . . 387
VI. Right and Obligation to account as between Companies and their Partners or Members, . . . 396
VII. Contribution and Indemnity, ... 406
SEC. 1. Liability of the Partners to contribute rateably towards the Losses and Debts of the Firm, . 406
SEC. 2. Cases in which a Partner's Claims against the Company suffer Abatement proportionally to his own Liability to Contribution, . . 408
SEC. 3. Of the Right which a Partner has to be indemnified by the Company for Losses sustained or Obligations incurred by him on its account, ... 409
VIII. Compensation, ... 416
IX. Retention or Lien, ... 425
X. Good-will, ... 430
XI. Extraordinary Privileges and Aggressive Powers, . 433
General Enactments, ... 441
XII. Lands Clauses Consolidation Act, . . . 444
Assessment of Claims, ... 449
Inquisition by Sheriff, ... 450
Inquisition by Arbitration, ... 451
Inquisition by Jury, ... 454
Inquisition by Valuators, ... 458
Power of Review, ... 459
Apportionment and Application of Compensation Money, ... 461
Obligations on Owner, etc., when Money has been paid or consigned, ... 465
Entry on Lands, ... 469
Portions of intersected Land, ... 471
Common Lands, ... 472
Mortgages, Liens, or other Rights in Security affecting Lands, ... 474
Feu-duties, Ground-annuals, Casualties of Superiority, etc., ... 476
Lands subject to Leases, ... 477
Lands omitted to be purchased, . . . 478
Lands taken beyond what is required for the purpose of the Undertaking, ... 479
Manner of holding Lands, and Rights of Superiors, . 480
Land Tax, Poor-rates, and Prison Assessment, . 485
XIII. Railway Clauses Consolidation Act, . . . 486
Temporary Occupation of Lands, . . . 489
Crossing of Roads and Construction of Bridges, . 491
Accommodation Works, ... 494
Mines lying under or near the Railway, . . . 497

PAGE

CHAP. XIV. In what Cases Compensation may be claimed, . . 500
XV. Bye-laws, ... 504
XVI. General Provisions as to Railway Traffic, . . . 507

BOOK IV.

JUDICIAL PROCEEDINGS.

CHAP. I. Preliminary, ... 519
II. Powers of Partners, etc., to bind the Company in Judicial Proceedings, ... 524
Suing and Defending, ... 524
Power to refer to Arbitration, and to compromise, . 527
Reference to Oath, ... 529
Admissions, ... 532
Power to take payment of Debts due to the Firm, and herein of granting Leases so as to bind the Firm, . 533
Notice, ... 536
III. How Partnerships and Common Law Companies Sue and are Sued, ... 537
Appearance in the descriptive Name, with Joinder of Partners, ... 539
Appearance in the social Name, ... 541
Appearance by Officials, ... 543
Appearance in name of all the Partners or Members, . 550
IV. How Corporations Sue and are Sued, . . . 554
Foreign Companies, ... 555
V. Jurisdiction, ... 557
Statutory Tribunals, ... 561
Declinature of Judge, ... 564
VI. Citation, or serving of Process, ... 566
SEC. 1. Firms and Common Law Companies, . . 566
SEC. 2. Corporations, ... 568
VII. Particular Actions and Forms of Procedure, . . 571
Interdict, ... 571
In Private Partnerships, ... 573
In Public Companies, ... 573
Interdict in Questions between Public Companies and Strangers, ... 579
VIII. Judicial Factor, ... 583
IX. Criminal and *quasi* Criminal Procedure, . . . 589
Statutory Penalties, ... 591
X. Arbitration, ... 595
Private Firms and Common Law Companies, . . 595
Statutory Arbitration, ... 597
XI. Evidence, ... 602
XII. Judicial Pleading and Issues, ... 609

PAGE

CHAP. XIII. Executorials, ... 620
SEC. 1. Diligence at the Company's instance, . . 622
SEC. 2. Diligence against the Company, . . 625
SEC. 3. When Diligence has to be used for a Company Debt against the Partners individually, . 626
Arrestment, ... 628
Procedure in Arrestments, . . . 637
Furthcoming, ... 639
Poinding, ... 640
(1.) Personal Poinding, . . . 640
(2.) Real Poinding, or Poinding of the Ground, ... 644
Inhibition, ... 645
Adjudication, ... 647
Adjudication at instance of the Company, . 648
Adjudications against the Company, . . 649
Adjudication against the Separate Estate of individual Partners as liable for Company Debts, ... 650
Diligence by and against Incorporated Companies, ... 650

BOOK V.

DISSOLUTION OF COMPANIES.

CHAP. I. Preliminary, ... 651
II. Dissolution of Private Copartneries and Unincorporated Companies, ... 656
Common Law Companies, ... 665
III. Consequences of Dissolution, and herein of the Winding up of Partnerships, ... 666
SEC. 1. Consequences of Dissolution as regards the Partners themselves, . . . 666
SEC. 2. Consequences of Dissolution as regards Third Parties, ... 676
IV. Consequences of Death, ... 681
Rights and Obligations of Partners in winding up Companies dissolved by Death, . . . 681
Testate and Intestate Succession, . . . 682
Transmission of Shares, ... 686
Rights and Liabilities, Executors and Representatives, ... 687
Provisions for Widows and Children, . . . 695
Procedure to recover Company Debts against the Estate of a deceased Partner, ... 697
V. Dissolution of Incorporated Companies, . . . 701

PAGE

CHAP. VI. Winding up under Act of 1862, ... 705
SEC. 1. Winding up by the Court, . . . 706
The Court for winding up, . . . 706
In what Circumstances winding up may take place, ... 708
Petition, and relative Procedure, . . 709
Official Liquidators, ... 711
Powers and Duties of Official Liquidators, . 711
Company Creditors, ... 712
Contributories and their Liabilities, . . 715
Who are Contributories, . . . 717
Members and their Representatives, . . 719
Effect of Transfers of Shares, . . . 723
Effect of Surrender and Forfeiture of Shares, . 724
Persons induced to take Shares by Fraud, . 725
Calls, ... 726
Costs, ... 729
Distribution of Surplus Assets, and Dissolution, 731
SEC. 2. Winding up voluntarily, . . . 731
SEC. 3. Winding up subject to Supervision of the Court, 735
VII. The Abandonment of Railways Act, 1850, . . 737
VIII. Amalgamation of Companies, ... 740
IX. Bankruptcy, ... 746
Partner becoming bankrupt while Company remains solvent, ... 705
Where the Company becomes bankrupt, and a Partner remains solvent, ... 752
Where both the Company and its Partners are bankrupt, 753
For what Claims the Estate is liable, . . . 755
Preferable Claims, ... 758
Election when the Firm is equivocal, . . . 760
Effects of Bankruptcy in relation to Contracts, . 760
Reduction of Deeds and Alienations, . . . 760
Modes of extricating Bankrupt's Affairs, . . 762
X. Sequestration, ... 765
Awarding of Sequestration, ... 766
Oath of Verity, ... 773
Recall of Sequestration, ... 775
Ranking of Claims, ... 776
Rules as to Voting, ... 776
Ranking for Dividends, ... 779
Election of Trustee, ... 782
Rights and Duties of Trustee, ... 786
Liabilities of Trustee and Commissioners, . . 793
Duties of the Bankrupt, ... 793
Examination of Bankrupt, ... 794
Allowance to Bankrupt, ... 796
Calling and Procedure at Meetings, . . . 796
Discharge of Bankrupt, ... 797
Cessio Bonorum, ... 799

PAGE

Supplemental Chapter on Railway Companies, ... 801
Formation of Railway Companies, ... 801
Constitution and Internal Management, ... 803
Constructive and aggressive Powers, and Compensation for their exercise, ... 803
Railway Construction Facilities Act, ... 804
The Railway Company Powers Act, ... 804
Arbitration, ... 805
Public Duties, ... 805
Dissolution of Railway Companies, ... 806

APPENDIX.

FORMS.

Articles of Copartnery, ... 809
Preliminary Observations, ... 811
Practical Suggestions, ... 812
I. Articles applicable to a Company consisting of Three or more Partners, ... 816
II. Contract of Copartnery between Two Traders, ... 833
Additional Articles, ... 844
Concluding Remarks, ... 847
Definitions of Society, ... 848
Judicial Appearance, ... 851
Issues, ... 854
Form of Declaration to authenticate Statements under Sec. 186 of the 25 and 26 Vict. c. 89 (1862), ... 866

STATUTES.

1 Vict. c. 73, An Act for better enabling her Majesty to confer certain Powers and Immunities on trading and other Companies, . . 869
1 Vict. c. 83, An Act to compel Clerks of the Peace for Counties and other Persons to take the Custody of such Documents as shall be directed to be deposited with them under the Standing Orders of either House of Parliament, ... 879
1 and 2 Vict. c. 98, An Act to provide for the Conveyance of the Mails, by Railways, ... 880
3 and 4 Vict. c. 97, An Act for regulating Railways, ... 885
5 and 6 Vict. c. 55, An Act for the better Regulation of Railways, and for the Conveyance of Troops, ... 889
5 and 6 Vict. c. 79, An Act to repeal the Duties payable on Stage Carriages and on Passengers conveyed upon Railways, and certain other Stamp Duties in Great Britain, and to grant other Duties in lieu thereof; and also to amend the Laws relating to the Stamp Duties, 895

PAGE

7 and 8 Vict. c. 85, An Act to attach certain Conditions to the Construction of future Railways authorized or to be authorized by any Act of the present or succeeding Sessions of Parliament; and for other Purposes in relation to Railways, ... 907

8 Vict. c. 3, An Act for the Appointment of Constables or other Officers for keeping the Peace near Public Works in Scotland, . . 914

8 Vict. c. 17, An Act for consolidating in One Act certain Provisions usually inserted in Acts with respect to the Constitution of Companies incorporated for carrying on Undertakings of a Public Nature in Scotland, ... 915

8 Vict. c. 19, An Act for consolidating in One Act certain Provisions usually inserted in Acts authorizing the taking of Lands for Undertakings of a Public Nature in Scotland, ... 940

8 and 9 Vict. c. 33, An Act for consolidating in One Act certain Provisions usually inserted in Acts authorizing the making of Railways in Scotland, ... 968

8 and 9 Vict. c. 28, An Act to empower Canal Companies and the Commissioners of Navigable Rivers to vary their Tolls, Rates, and Charges on different Parts of their Navigations, ... 998

8 and 9 Vict. c. 42, An Act to enable Canal Companies to become Carriers of Goods upon their Canals, ... 1001

8 and Vict. c. 96, An Act to restrict the Powers of selling or leasing Railways contained in certain Acts of Parliament relating to such Railways, ... 1004

9 Vict. c. 20, An Act to amend an Act of the Second Year of her present Majesty, for providing for the Custody of certain Monies paid, in pursuance of the Standing Orders of either House of Parliament, by Subscribers to Works or Undertakings to be effected under the Authority of Parliament, ... 1004

9 and 10 Vict. c. 57, An Act for regulating the Gauge of Railways, . 1007

10 and 11 Vict. c. 42, An Act to transfer the Collection and Management of the Duties in respect of Stage Carriages, Hackney Carriages, and Railway Passengers from the Commissioners of Stamps and Taxes to the Commissioners of Excise, ... 1008

10 and 11 Vict. c. 69, An Act for the more effectual Taxation of Costs on Private Bills in the House of Commons, ... 1010

10 and 11 Vict. c. 85, An Act for giving further Facilities for the Transmission of Letters by Post, and for the regulating the Duties of Postage thereon, and for other Purposes relating to the Post Office, ... 1013

10 and 11 Vict. c. 94, An Act to amend an Act to enable Canal Companies to become Carriers upon their Canals, ... 1016

12 and 13 Vict. c. 78, An Act for the more effectual Taxation of Costs on Private Bills in the House of Lords, and to facilitate the Taxation of other Costs on Private Bills in certain Cases, . . 1017

13 and 14 Vict. c. 83, An Act to facilitate the Abandonment of Railways, and the Dissolution of Railway Companies, in certain Cases, . 1021

14 and 15 Vict. c. 49, An Act to repeal an Act of the Eleventh and Twelfth Years of her present Majesty, for making preliminary Inquiries in certain Cases of Applications for Local Acts, and to make other Provisions in lieu thereof, ... 1030

PAGE

14 and 15 Vict. c. 64, An Act to repeal the Act for constituting Commissioners of Railways, ... 1031

17 and 18 Vict. c. 31, An Act for the better Regulation of the Traffic on Railways and Canals, ... 1032

21 and 22 Vict. c. 75, An Act to amend the Law relating to Cheap Trains, and to restrain the Exercise of certain Powers by Canal Companies being also Railway Companies, ... 1035

21 and 22 Vict. c. 78, An Act to enable the Committees of both Houses of Parliament to administer Oaths to Witnesses in certain Cases, . 1035

22 and 23 Vict. c. 59, An Act to enable Railway Companies to settle their Differences with other Companies by Arbitration, . . 1036

23 Vict. c. 14, An Act for granting to her Majesty Duties on Profits arising from Property, Professions, Trades, and Offices, . . 1038

23 and 24 Vict. c. 106, An Act to amend the Lands Clauses Consolidation Acts (1845) in regard to Sales and Compensation for Land by way of a Rentcharge, Annual Feu-duty or Ground-annual, and to enable her Majesty's Principal Secretary of State for the War Department to avail himself of the Powers and Provisions contained in the same Acts, ... 1039

24 and 25 Vict. c. 50, An Act for facilitating the Transfer of Mortgages and Bonds granted by Railway Companies in Scotland, . . 1040

25 and 26 Vict. c. 89, An Act for the Incorporation, Regulation, and Winding up of Trading Companies and other Associations, . 1041

26 and 27 Vict. c. 92, An Act for consolidating in One Act certain Provisions frequently inserted in Acts relating to Railways, . . 1099

26 and 27 Vict. c. 112, An Act to regulate the Exercise of Powers under Special Acts for the Construction and Maintenance of Telegraphs, . 1109

27 Vict. c. 19, An Act to enable Joint-stock Companies carrying on Business in Foreign Countries to have Official Seals to be used in such Countries, ... 1122

27 and 28 Vict. c. 120, An Act to facilitate in certain Cases the obtaining of further Powers by Railway Companies, . . . 1123

27 and 28 Vict. c. 121, An Act to facilitate in certain Cases the obtaining of Powers for the Construction of Railways, . . . 1130

28 Vict. c. 27, An Act for awarding Costs in certain Cases of Private Bills, ... 1147

28 and 29 Vict. c. 86, An Act to amend the Law of Partnership, . 1148

Convention between her Majesty and the Emperor of the French, relative to Joint-stock Companies, ... 1149

INDEX OF CASES.

PAGE

A. B. *v.* Binny, ... 795
A'Beckett *ex parte*, . . . 730
Abel *v.* Sutton, ... 317
Abercrombie, petr., . . . 586
Aberdeen Brewery Co. *v.* Gray, . 243
Aberdeen Ra. Co. *v.* Blaikie, . 209
Aberdeen Ra. Co. *v.* Ferrier, 557, 566
Aberdeen Town and County Bank *v.* Clark, . . 66, 136, 377, 668, 852
Aberdeen Town and County Bank *v.* Scottish Equitable Insurance Co., 564
Abraham *v.* Great Northern Railway Co., ... 488, 489
Acton *v.* Blundell, . . . 501
Adam *v.* M'Lachlan, . . . 771
Adams *v.* Bingley, . . . 536
Adams *v.* M'Leroy and Co., . . 376
Adamson *v.* Edinburgh and Glasgow Ra. Co., ... 485
Addie *v.* Western Bank, . . 725
Addinell's case, ... lxvi
Addison and Sons *v.* Crabb, . 799
Addison *v.* Tate, ... 322
Adley *v.* Whitstable Ra. Co., 193, 381, 382, 576, 577
Advocate-General *v.* Grants, . 363
Advocate-General *v.* Wilson, . 414
Agace *ex parte*, ... 247
Agar *v.* Athenæum Assurance Society, 217, 527
Agar *v.* Macklew, . . . 403
Agar *v.* Regents Ra. Co., . . 581
Aggs *v.* Nicholson, . . . 231
Agricultural Cattle Insurance Co. (Stanhope's case), . . . lxvii
Aitken's Trs. *v.* Shanks, . 663, 666
Ainslie *v.* his Creditors, . . 799
Aitchison and Co. *v.* Burnside's Trs., 524, 541, 542, 552
Aitchison *v.* Lee, ... 313
Aitken *v.* Rennie, . . . 590
Aitkens *v.* Crawford, . . . 27
Aitken's Trs. *v.* Shanks, . 666, 667

PAGE

Aiton *v.* Cheap, . . . 312, 663
Akhurst *v.* Jackson, . . 356, 752
Alcock *v.* Taylor, ... 657
Alder *v* Fouracre, 183, 210, 331, 573
Alderson *v.* Clay, ... 111
Alderson *v.* Pope, . . . 59, 248, 536
Aldham *v.* Brown, . 162, 356, 357
Alexander's case, . . . 328
Alexander *v.* Clark, . 300, 346, 370
Alexander *v.* M'Lay and Others, . 640
Alexander *v.* Scott, . . . 361
Alexander *v.* West End of London and Crystal Palace Ra. Co., . 471
Alison *v.* African and Indian Co., 629
Allan *v.* Allan and Co., . . 269
Allan *v.* Allan's Trs., . . . 173
Allan *v.* M'Leish, ... 262
Allan *v.* Morrison, . . . 784
Allan *v.* Ormiston, . . . 280
Allan *v.* Turnbull, . . . 327
Allan *v.* Wright and Glasgow Exchange Co., . . . 259, 261
Allen *v.* Kilbre, . . . 346, 673
Allen *v.* Sea, Fire, and Life Assurance Co., ... 231
Allfrey *v.* Allfrey, . . . 402
Ambergate Ra. Co. *v.* Mitchell, 135, 159
Anchor case *in re* Era Insurance Co., 213, 742
Anderson *v.* Aberdeen Ra. Co., . 580
Anderson *v.* Bank of Scotland, . 564
Anderson *v.* Bolton and Barker, 627, 643
Anderson *v.* Bolton, . . . 627
Anderson *v.* Brownlee, . . 263, 363
Anderson *v.* Campbell, . 36, 563, 702
Anderson *v.* Cullen, . 163, 164, 647
Anderson *v.* Currie, . . 627, 643
Anderson *v.* Deeside Ra. Co., . 452
Anderson *v.* Goddart and Co., . 252
Anderson *v.* M'Nair and Brand, . 578
Anderson *v.* Monteath, . 774, 785
Anderson *v.* Morton, . . 235, 243
Anderson *v.* Pyper and Co., . . 264

PAGE
Anderson *v.* Rutherford, 423, 424, 673, 679
Anderson *v.* Union Canal Co., . 375
Anderson *v.* Wright, . . . 606
Anderson and Childs *v.* Pott and M'Millan, ... 639
Anderson and Child *v.* Wood, . 558
Anderson and Co. *v.* Collier, . . 426
Anderson and Others *v.* Simpson, . 668
Anderston New Victualling Society *v.* Dewar and Co., . . 48, 216, 229
Anderston Victualling Society, 48, 229
Andrews *v.* Garstin, . . 354, 654
Angas' case, ... 717, 721
Anglo-Australian Insur. Co. *v.* Brit. Prov. Insur. Society, . 213, 742
Anon, ... 533, 573
Anstruther *v.* East of Fife Ra. Co., 578
Antram *v.* Chase, ... 529
Appin's Creditors, . . . 427
Appleton *v.* Binks, . . . 328
Apps *ex parte*, ... 724
Apsey *ex parte*, ... 255
Arbuckle *v.* Taylor, . . . 590
Arbuthnot *v.* Arbuthnot, . . 694
Arden *v.* Sharp, ... 216
Ardrossan Ra. Co. *v.* Glasgow, Kilmarnock, and Ardrossan Ra. Co., 575
Armitage *v.* Winterbottom, . . 240
Armour *v.* Finlay and Co., . . 643
Armour *v.* Gibson, . . 309, 315
Armstead *v.* North Stafford Ra. Co., 446
Armstrong's Assignees *v.* Leith Banking Co., ... 373
Armstrong's case, . . 328, 722
Armstrong *v.* Edinburgh and Leith Shipping Co., . . . 374
Arnauld *v.* Boick, . . . 27
Arnot *v.* Stewart, . . . 559
Arton *v.* Booth, ... 536
Askew's case, ... 98
Aspinall *v.* London and North-Western Ra. Co., ... 534
Astle *v.* Wright, ... 355
Athenæum Life Society, *re* the, . 288
Athenæum Insurance Co. *v.* Pooley, 205, 208, 213, 216, 219
Atkyns *v.* Kinnier, . . . 676
Attorney-General *v.* Andrews, . 578
Attorney-General *v.* Davy, . . 35
Attorney-General *v.* East. Counties Ra. Co., ... 488, 579
Attorney-General *v.* Great Northern Ra. Co., . . . 492, 517
Attorney-General *v.* London and Southampton Ra. Co., . . . 492
Attorney-General *v.* London and S.-W. Ra. Co., ... 492
Attorney-General *v.* Manch. and Leeds Ra. Co., ... 581
PAGE
Attorney-General *v.* Sheffield Gas Co., ... 580
Attorney-General *v.* Tewkesbury and Malvern Ra. Co., . . . 487
Attorney-General *v.* United Kingdom Electric Telegraph Co., . . 518
Attwood *v.* Kinnear and Sons, 220, 426, 790
Attwood *v.* Munnings, . . . 234
Aubert *v.* Maze, ... 18
Auchmutie *v.* Ferguson, . . 605
Ault *v.* Goodriche, . . 316, 678
Austen *v.* Boys, ... 432
Australian Auxiliary Steam Clipper Co. *v.* Mounsey, 134, 190, 217, 221, 225
Aylesbury Ra. Co. *v.* Thompson, 165, 167
Ayray's case, ... 36
Ayre's case, ... 259
Aytoun *v.* Dundee Banking Co., 311, 359, 406, 669
Aytoun *v.* Magistrates of Kirkcaldy, 374

Backwell *v.* Child, . . . 142
Bagg's case, ... 152, 724
Baglehole *ex parte*, . . . 28
Bagnall *v.* London and North-Western Ra. Co., ... 503
Bagshaw *v.* Eastern Union Ra. Co., 71, 192, 204, 205, 576
Bagshaw *v.* Parker, . . . 660
Baily's case, ... 153
Bailey *v.* Birkenhead Ra. Co., . 575
Bailey *v.* Universal Provident Association, ... 144
Bain *v.* Balfour and Co., . . 361
Bain *v.* Black, ... 661
Baird *v.* Caledonian Ra. Co., . 588
Baird *v.* Graham, . . . 363
Baird *v.* Hamilton, . . . 263
Baird *v.* Monklands Iron and Steel Co., ... 580
Baird *v.* Planque, ... 58
Baird *v.* Reilly, ... 147
Baird *v.* Ross, . . . 82, 335, 356
Bakers' case, ... 412
Baker *v.* Charlton, . . 234, 760
Bakers of Paisley *v.* Magistrates of Paisley, ... 376
Bald *v.* Alloa Colliery Co., . . 364
Baldwin *v.* Lawrence, . . . 389
Balfour's Trs. *v.* Edinburgh and Northern Ra. Co., 37, 107, 193, 199, 387, 576
Balfour *v.* Ernest, . 116, 218, 235
Balfour *v.* Kerr, . . . 345, 524
Ballam *v.* Price, ... 276
Ballandene *v.* Glasgow Union Bank, 344, 348, 380
Balmain *v.* Shore, . . . 178
Bank of Augusta *v.* Earle, . . 555

PAGE

Bank of Australasia *v.* Bank of Australia, ... 217, 218
Bank of Gibraltar *v.* Malta, . 707, 735
Bank of London *v.* Tyrrell, . . 209
Bank of Scotland *v.* Ogilvie's Trs., 649
Bank of Scotland *v.* Ramsay, . 564
Bank of A. Charles *v.* De Bernares, 556
Bannatyne's Representatives *v.* Brown's Trs., ... 269, 270
Banwen Iron Co. *v.* Barnett, . 166
Barclay's case, ... 726
Barclay *ex parte*, . . . 145, 710
Barclay *v.* Lawrie, . . 668, 673
Barfoot *v.* Goodal, ... 310
Bargate *v.* Shortridge, 74, 141, 144, 166, 207
Baring *v.* Dix, ... 661
Barker *v.* Allan, ... 238, 332
Barker *v.* Richardson, . . . 536
Barklie *v.* Scott, ... 23, 48
Barnet *v.* Lambert, ... 81
Barnsley Canal Co. *v.* Twibell, 498, 502
Barr *v.* Speirs, ... 658, 661
Barr *v.* Stirling and Dunfermline Ra. Co., ... 488
Barret *ex parte*, ... 725
Barret *v.* Great Northern Ra. Co., 516
Barron *v.* National Bank, . . 328
Barrow *ex parte*, ... 60
Barry *v.* Croskey, ... 145
Barry *v.* Nesham, . . 53, 54, 56
Barstow *v.* Lindsay, ... 756
Bartlett *v.* Lambert, ... 76
Barton's case, . 154, 193, 381, 725
Barton *v.* Hanson, ... 292
Bartonshill Coal Co. *v.* M'Guire, . 364
Bartonshill Coal Co. *v.* Reid, . 364
Basset *v.* Wood, ... 275
Batard *v.* Douglas, . . . 62, 80
Batard *v.* Hawes, . . 80, 62, 239
Batchelor *v.* M'Gilvray, . 239, 362
Battley *v.* Lewis, ... 61
Baxendale *v.* Great Western Ra. Co., 517
Baxendale *v.* London and South-Western Ra. Co., ... lxviii
Baxter *v.* Aitchison, ... 66
Baxter *v.* Earl of Portsmouth, . 26
Baxter *v.* North British Ra. Co., 437, 441, 579
Baxter *v.* West, ... 661
Bayley *ex parte*, ... 355
Bayley *v.* Wilkins, ... 145
Bayliffe *v.* Butterworth, . . 145
Baynard *v.* Wooley, ... 414
Bayne *v.* Ferguson, ... 178
Bayne *v.* Kidd, ... 382
Beadell *v.* Eastern Counties Ra. Co., 517
Beak *v.* Beak, ... 669
Beale *v.* Caddick, ... 268
Beale *v.* Mouls, ... 79

PAGE

Beardmer *v.* London and North-Western Ra. Co., ... 487
Beath *v.* Campbell, ... 415
Beattie *v.* M'Lellan, ... 641
Beck *ex parte*, ... 583
Beck *v.* Kanterowicz, . . 82, 209, 331
Beckham *v.* Drake, . . . 219, 239
Beckett *v.* Midland Ra. Co., . . lxvii
Beckitt *v.* Bilbrough, . . 71, 147, 164
Bedford *v.* Bagshaw, ... 82
Bedford *v.* Deakin, ... 274
Beech *v.* Eyre, ... 79
Begbie and Co. *v.* Frame, . . 364
Belch, Dundas *v.*, . . 533, 602, 795
Belfast Ra. Co. *v.* Strange, . . 163
Belhaven *ex parte*, ... 725
Bell's case, ... 259, 726
Bell *ex parte*, ... 586
Bell *v.* Hull and Selby Ra. Co., . 579
Bell *v.* Lady Ashburton, . . 685
Bell *v.* Leighton, ... 252
Bell *v.* London & North-Western Ra. Co., 533
Bell *v.* Phyn, ... 178
Bell *v.* Williamson, . . 316, 674
Bell *v.* Willison, . 397, 550, 691, 693
Bellis & Thundercliffe *v.* M'Gregor, 766, 772
Beman *v.* Rufford, . . 439, 576
Benjamin *v.* Porteous, ... 54
Benford *v.* Dommett, ... 378
Bennet *v.* Fraser, ... 634
Benson *v.* Heathorn, . . 185, 209
Bentley *v.* Bates, . . . 51, 141, 397
Bentley *v.* Craven, . 182, 184, 331
Berresford's case, ... 153
Berry *v.* Lamb, . . 182, 183, 415
Berrys *v.* Wight, ... 281
Bertram *v.* M'Intosh, ... 310
Besch *v.* Frolich, ... 660
Best's case, ... 720
Bevan *v.* Lewis, ... 219
Bevan *v.* M'Connell, ... 26
Beveridge *v.* Wilson, ... 852
Biddulph *ex parte*, ... 254
Bigge's case, ... 260
Bignold *ex parte*, 344, 401, 412, 413, 414
Bignold *v.* Waterhouse, . . . 536
Bill *v.* Sierra Nevada Mining Co., 578
Binford *v.* Dommett, ... 136
Binks *v.* South Yorkshire and River Devon Co., ... 496
Binnie *v.* Mackray, ... 551
Birkenhead and Lancashire Ra. Co., 24, 104, 159, 163, 165, 166
Birmingham, Bristol, etc., Ra. Co. *v.* Locke, . . . 71, 74, 105, 163, 165
Bishop *v.* Church, ... 690
Bishop *v.* Countess of Jersey, . 255
Bishop *v.* Mersey and Clyde Navigation Co., ... 559, 566

PAGE
Bisset v. Nicholson, ... 784
Black v. Formartine and Buchan Ra. Co., ... 495, 579
Black and Knox v. Ellis and Sons, 559
Blackburn's case, ... 63, 725
Blackburn v. Buchanan, 75, 108, 374, 576
Blackburn v. Finlay, . . 75, 108, 374
Blackburn v. Stewart, 107, 190, 192, 411, 576
Blackly v. Rymer, ... 401
Blackwood v. Hay, ... 66
Blackwood and Co. v. Bower, . 372
Blaikies v. Aberdeen Ra. Co., 126, 250
Blaikie v. Duncan, ... 346
Blair v. Bromley, . . . 254, 256
Blair v. Bryson, . 216, 229, 247, 372
Blair v. Douglas, Heron, and Co., 407, 671, 672
Blair v. Miller and Douglas, . . 248
Blair v. Russell, 135, 369, 603, 668, 680
Blair v. Sampson, ... 564
Blair Iron Co. v. Alison, 260, 229, 232, 243
Blair's Trs., petr., ... 463
Blake *ex parte*, ... 725
Blakeley's Executors' case, . . 312
Blakeney v. Dufaur, . . 584, 675
Blew v. Wyatt, ... 273, 308
Bligh v. Brent, ... 145
Blisset v. Daniel, . 153, 154, 657, 815
Bluck v. Mallalue, . 353, 414, 577
Blundell v. Brettargh, . . . 672
Blundell v. Winsor, ... 20
Bodenham v. Purchas, . 268, 269, 278
Bodmin United Mines, *in re*, . 152
Boe v. Anderson, ... 561
Bogle's Creditors v. Ballantyne, 270, 421, 423
Bonar v. Liddell, . . . 773, 785
Bonbonus *ex parte*, 200, 220, 230, 249
Bond v. Gibson, . . . 212, 249
Bond v. Pittard, ... 49
Bo'ness Canal Co. v. M'Alpine, 73, 200
Booth v. Booth, ... 692
Booth v. Commercial Bank, 234, 237, 358, 526, 543
Booth v. Parkes, ... 669
Booth v. Quin, ... 200
Borrows v. Colquhoun, . 171, 365
Borthwick v. Wright, . . . 762
Bosanquet v. Shortridge, . 109, 166
Bostock v. North Staffordshire Ra. Co., 205
Boswell v. Glasgow and South-Western Ra. Co., ... 488
Bosworthen Mines, *in re*, . . 730
Bothwell v. Humphries, . . 216
Boulter v. Peplow, ... 80
Boulton v. Mansfield, . . . 53, 309
Bourne v. Freeth, ... 59
Bow, etc., v. Patrons of Cowan's Hospital, . . 526, 527, 544, 554
PAGE
Bower v. Swadlin, . . . 276
Bowes v. Ravensworth, . . 497
Bowie v. Wilson, . 235, 243, 358
Bowmont v. Boultbee, . . . 402
Boyd v. Fraser's Trs., . . 346, 674
Bradley v. Heath, ... 328
Bradley v. London and North-Western Ra. Co., ... 451
Bradley v. Southampton Local Board of Health, ... 502
Bradshaw's Arbitration, . . 449
Braithwaite v. Skofield, . . 60, 80
Bramah v. Roberts, . . 231, 235
Brand v. Hammersmith and City Ra. Co., ... lxvii
Brand v. Kennedy, ... 415
Brash v. Steel, ... 262
Brashe v. M'Kinnon, . . . 18
Brasier v. Hudson, . . 534, 681
Bray v. Fromont, ... 60, 397
Braynton v. London and North-Western Ra. Co., ... 492
Brechin Gas Co. v. Whitson, . 144
Breichan v. Muirhead, . . . 349
Bremner v. Chamberlayne, . . 79
Bremner v. Huntly Friendly Society, 562
Brereton v. Stewart, . . . 647
Brettel v. Williams, . . 199, 236
Bright v. Hutton, ... 78
Bright v. North, ... 192
Brickbede Life Assurance Co., *in re*, 730
Brine v. Great Western Ra. Co., . 503
British Alkali Co., *in re*, . . 709
British and Foreign Cork Co. (Leifchild's case), . . . lxvi
British Linen Co. v. Alexander, . 373
British Sugar Co., ... 110
Broadbent v. Imperial Gas Co., . 580
Brock v. Brown, ... 182
Brockbank v. Anderson, . . 65
Brockwell's case, . . . 259, 726
Brooke v. Garrod, ... 684
Brooke v. Enderby, . . 268, 315
Broome *ex parte*, . . . 59, 585, 674
Broom v. Edgley, . . 281, 531
Broom v. Hall, ... 145
Broughton v. Broughton, . . 366
Brown's case, ... 213
Brown's Claim, . . . 219, 742
Brown *ex parte*, . . . 218, 723
Brown v. Sir C. Adam, 107, 192, 375, 387, 576, 578
Brown v. Andrew, . 109, 196, 207
Brown v. Blaikie, ... 631
Brown v. Byers, ... 231
Brown v. De Tastet, 183, 397, 415, 669, 688
Brown v. Duncan, ... 19
Brown v. Edinburgh and Glasgow Ra. Co., ... 496

PAGE
Brown *v.* Forsyth, . . . 253
Brown *v.* Fruth, ... 62
Brown *v.* Gibbins, . . 409, 410
Brown *v.* Gordon, . . . 274
Brown *v.* Heritors of Kilberry, . 564
Brown *v.* Leonard, . . . 318
Brown *v.* M'Callum, . . 772, 774
Brown *v.* M'Dougall and Co., 245, 246
Brown *v.* M'Gregor, . . . 363
Brown *v.* Monmouthshire Ra. Co., 381, 383, 385, 577
Brown *v.* Oakshott, . . . 176
Brown *v.* Ogilvie, . . . 679
Brown *v.* Perkins, . . . 402
Brown *v.* Richmond and Co., . 564
Brown *v.* Smith, ... 239
Brown *v.* Syme, . . . 258, 353
Browning *v.* Great Central Mining Co., 85
Bruce and Co. *v.* Beat, . . 199
Bruce *v.* M'Kenzie, . . . 371
Bruce *v.* Ogilvie, . . . 173, 377
Brydges *v.* Branfill, . . . 254
Bryon *v.* Metropolitan Saloon Co., 134, 190, 216, 217, 224, 577
Buchanan *v.* Adam, . . . 274
Buchanan and Anderson, petrs., . 769
Buchanan *v.* Caledonian Ra. Co., 437, 441, 579
Buchanan *v.* Dennistoun, . . 237
Buchanan *v.* Lennox, 136, 305, 380, 401, 668
Buchanan *v.* Magistrates of Dunfermline, 283
Buchanan *v.* Muirhead, 596, 671, 672
Buchanan *v.* Parker, . . . 376
Buchanan *v.* Somerville, 272, 300, 308
Buchanan *v.* West of Scotland Iron Co., 534
Buck *v.* Buck, . . . 145, 146
Buckwall *v.* Royston, . . . 428
Buckley *ex parte*, . . . 246
Budd's case, ... 328
Budd *ex parte*, ... 724
Bugg *ex parte*, ... 721
Bullen *v.* Sharp, ... lxvi
Bullock *v.* Chapman, . . 573, 575
Bult *v.* Morrell, . . . 233, 235
Bunn's case, ... 328
Bunten *v.* Barclay, . . 71, 143, 152
Burden *v.* Burden, . . 183, 688
Burdon *v.* Barkus, . . . 658
Burge *v.* Burton, ... 366
Burgess *v.* Buck and Co., . 246, 559
Burgh *v.* Legge, ... 161
Burlinson's case, ... 717
Burmestro *v.* Norris, . . . 216
Burn *v.* Burn, ... 690
Burness *v.* Pennel (Forth Marine Insurance Co.), 108, 143, 165, 203, 356, 383, 527, 536.
Burnet *v.* Calder, . . . 795
PAGE
Burnet *v.* Knowles, . . 441, 563
Burnet *v.* Lynch, . . . 164
Burns *v.* Bruce and Baxter, . . 631
Burns *v.* Laurie's Trustees, 367, 427, 790
Burnside *v.* Dayrell, . . . 79, 82
Burls *v.* Smith, ... 60, 80
Burstall *v.* Stein, ... 854
Burt *v.* Bell, ... 787
Burt *v.* British Nation Insurance Asso., 152
Burton *v.* Issett, ... 317
Bury *v.* Allen, . . . 330, 355
Busk's case, ... 724
Butchart *v.* Dresser, . 195, 316, 673
Bute, Marquis of, petr., . . 462

Cabbell *v.* Brock, . . . 540, 547
Cadell *v.* Paul, ... 607
Caithness, Earl of, *v.* Eaton, Hammond, and Co., ... 645
Calder *v.* Downie, . . . 22, 23
Calder and Hebble Navigation Co. *v.* Pilling, ... 506
Calder *v.* Miller, ... 790
Caldicott v. Griffiths, . . . 46, 81
Caledonian Dairy Co. *v.* Campbell, 62, 132
Caledonian and Dumbarton Ra. Co. *v.* Crum, ... 860
Caledonian and Dumbartonshire Ra. Co. *v.* Lockhart, . 104, 105, 603
Caledonian Insurance Co. *v.* British Linen Co., ... 262
Caledonian Iron Co. *v.* Clyne, 645, 646
Caledonian Ra. Co. *v.* Barr, 479, 502, 503
Caledonian Ra. Co. *v.* Belhaven, . 498
Caledonian Ra. Co. *v.* Buchanan, 580, 581
Caledonian Ra. Co. *v.* Campbell, . 73
Caledonian Ra. Co. *v.* Colt, . . 501
Caledonian Ra. Co. *v.* Edinburgh and Glasgow Ra. Co., . . . 446
Caledonian Ra. Co. *v.* Lockhart, 163, 452
Caledonian Ra. Co. *v.* Lockhart's Trs., 452
Caledonian Ra. Co. *v.* Ogilvie, 459, 494, 501, 503
Caledonian Ra. Co. *v.* Sprot, . 498
Cambridge, Corporation of, *ex parte*, 462
Cameron *v.* Charing Cross Ra. Co., 449, 503
Camerons, Colebrook, and Co. *v.* Edwards, ... 231, 233
Cameron *v.* M'Murray, . . . 388
Cameron's Trs. *v.* Cameron, . . 415
Cammell *v.* Sewell, . . . 560
Campbell, petr., . . 316, 462, 769
Campbell *v.* Baird, . . . 239
Campbell *v.* Ballantyne, . 282, 532
Campbell *v.* Beath, . . . 182
Campbell *v.* Buchanan, . . 784
Campbell *v.* Calder Iron Co., 171, 174, 175, 176, 679

PAGE
Campbell v. Caledonian Ra. Co., 363, 514
Campbell v. Campbell, 330, 331, 333, 400, 414
Campbell v. Cruickshank, . . 273
Campbell v. Edinburgh and Glasgow Ra. Co., . . 493, 502, 580
Campbell v. Faikney, . . . 633
Campbell v. Lauder, etc., . . 76, 77
Campbell v. M'Farlane, . . 65, 533
Campbell v. M'Lintock, . . 309
Campbell v. Maund, . . . 117
Campbell v. Mullet, . . . 51, 175
Campbell v. Myles, . 773, 774, 785
Campbell, Sir H., v. Orphan Hospital and Workhouse, . . . 179
Campbell Renton v. North British Ra. Co., . . . 448, 449, 579
Campbell v. Stein, . . . 240
Campbell's Trs. v. Thomson, 136, 377, 379, 668
Candler v. Candler, . . 19, 586, 674
Cape's Executors' case, . . . 303
Cappers' case, ... 77
Carden v. General Cemetery Co., . 81
Carden v. Dundee and Perth Ra. Co., 262
Cargill v. Sir J. Forrest, . . 575
Carlen v. Drury, ... 577
Carlisle v. South-Eastern Ra. Co., 385, 577
Carmarthen Ra. Co. v. Wright, . 105
Carmichael's case, . . . 70
Carrick v. Saunders, . . . 606
Carron v. Cowan and Co., . . 27
Carron Co. v. Maclaren, . . 559
Carron Co. v. Stainton, . 560, 561
Carruthers v. Johnstone, . 545, 548
Carter v. Horne, ... 210
Carter v. Whalley, . . . 315
Castle-Douglas Ra. Co. v. Lee, etc., 581
Catchpole v. Ambergate Ra. Co., 106, 154
Caterham Co. v. Brighton Ra. Co., 517
Cathcart v. Blackwood, . . 798
Catholic Publishing, etc., Co. (Limited), *in re*, ... 710
Catt v. Howard, . . . 296, 533
Caven v. Mackie, . . . 415, 643
Chalmers v. Chalmers, . 142, 472, 694
Chamberlain's case, . . . 503
Chamberlain v. West End and Crystal Palace Ra. Co., . . 501, 503
Chanter and Co. v. Borthwick, 556, 561
Chapman's case, ... lxviii
Chapman v. Beach, . . . 585
Chapman v. Monmouth Ra. Co., . 458
Charitable Corporation v. Sutton, 208
Charlton v. Newcastle Ra. Co., 192, 576
Charlton v. Poulter, . 388, 573, 661
Chatto and Co. v. Pyper, . . 65, 602
Chavanay v. Van Sommer, . . 657
Cheale v. Kenward, . 148, 164, 353
PAGE
Cheap v. Aiton, ... 312
Cheetham v. Ward, . . . 276
Cheltenham and Great Western Ra. Co. v. Daniel, ... 143
Cheltenham and Great Western Ra. Co. v. Price, . . . 104, 163
Cheyne v. Guthrie, . . . 783
Cheyne v. Little, . . . 545, 548
Child v. Ferguson's Trs., . 361, 674
Child v. Morley, ... 410
Childs v. Morrins, . . . 328
Chilton v. London and Croydon Ra. Co., ... 506
Chippendale *ex parte*, 199, 219, 344, 413
Christie v. Caledonian Ra. Co., . 493
Christie v. Reid, . 201, 242, 349, 361
Christie v. Royal Bank, 59, 269, 311, 663
Chivas v. Duke of Gordon, . . 563
Chuck *ex parte*, ... 53
Churnside v. Currie, . . . 25
Church of England Life and Fire Assurance Company v. Wink, etc., 360
Churton v. Douglas, . 431, 573, 676
City of Berne v. Bank of England, 556
City of London Gas Company v. Nicholls, . . . 212, 246
Clarke's case, ... 730
Clarke v. Bickers, . . . 690
Clarke v. Chaplin, . . 82, 356
Clarke v. Dickson, . . . 725
Clarke v. Hart, . . 152, 153, 154
Clarke v. Imperial Gas Company, 527
Clark v. Loos, ... 633
Clarke v. Manchester, Sheffield, and Lincoln Ra. Co., . . . 492
Clarke v. Shepherd, . . 199, 243
Clarke v. Russel, . . . 360
Clarke v. Tipping, . . . 402
Clarke v. Wilson, . . . 548
Clay v. Langslow (Clayton's case. See Devaynes v. Noble), . . 65
Clayton v. Kynaston, . . . 276
Clegg v. Fishwick, 184, 210, 331, 387, 675
Cleland v. M'Cleland, 281, 282, 532, 608
Cleland v. Magistrates of Pittenweem, 243
Cleland v. Weir, ... 617
Clements v. Bowes, . . . 402
Clements v. Hall, 175, 184, 210, 331, 669
Clements v. Todd, . . . 82
Clerk v. Russell, ... 680
Clifford v. Brooke, . . . 355
Clifton's case, ... 730
Clouston v. Edinburgh and Glasgow Ra. Co., ... lxvii
Clowes v. Brettell, . . . 81
Clyne v. Edinburgh Oil Gas Co., . 864
Coats v. Clarence Ra. Co., . . 579
Coates v. Nottingham Water Works Co., ... 382

PAGE
Cochrane, petr., ... 462
Cochrane *v.* Black, 175, 255, 381, 669, 691
Cochrane *v.* Bogle and Co., . . 649
Cochrane *v.* Paul, ... 560
Cochrane and Co. *v.* Mathie, . 269
Cockerell *v.* Van Diemen's Land Co., 147
Cockburn *v.* Richardson, . . . 264
Cohen *v.* Wilkinson, ... 576
Colbech, *in re*, ... 53, 54
Cole *v.* West London and Crystal Palace Ra. Co., ... 471
Coleman *v.* Eastern Counties Ra. Co., 205, 576
Collie *v.* Cruickshank, ... 728
Collins *v.* North British Bank, 108, 334, 388, 389
Collins *v.* South Staffordshire Ra. Co., 453
Collins *v.* Young, ... 585
Collinson *v.* Lister, ... 536
Colquhoun *v.* Finlay, Duff, and Co., 220, 368
Colt *v.* Caledonian Ra. Co., . . 441
Colt *v.* Woollaston, ... 654
Columbine *v.* Chichester, . 147, 353
Commercial Bank *v.* Pollock Trs., 362, 537, 547
Connell *ex parte*, ... 173
Connell *v.* Clyde Trs., ... 438
Conway's case, ... 730
Const *v.* Harris, . . 190, 196, 815
Conybeare *v.* New Brunswick Ra. Co., 654
Cook *v.* Collingridge, ... 667
Cookson *v.* Cookson, ... 178
Cooling, *in re*, ... 502
Coope *v.* Eyre, ... 47
Cooper *v.* Bertram, Shotts Friendly Society, ... 595
Cooper *v.* North British Ra. Co., . 488
Cooper *v.* Shropshire Ra. Co., . 575
Cooper *v.* Watlington, . . . 676
Cooper *v.* Watson, ... 432
Copeland *v.* North-Eastern Ra. Co., 106, 144
Copland *v.* Toulmin, ... 379
Corden *v.* Universal Gas Light Co., 163
Cork and Bandon Ra. Co. *v.* Cazenove, 25, 165
Cormack *v.* Campbell, . 782, 784
Cornwall Consolidated Mining Co. *v.* Bennett, ... 111
Corpe *v.* Overton, ... 24
Corrie *v.* Calder, ... 428
Corrigal *v.* London and Blackwall Ra. Co., ... 460
Corry *v.* Londonderry Ra. Co., 382, 383
Corse *v.* Corse, ... 137, 178
Corse *v.* Masterton, ... 630
Corstorphine *v.* Trades of Calton, 37, 98
Costello's case, ... 328, 721
Costello *ex parte*, ... 724

PAGE
Cother *v.* Midland Ra. Co., . . 488
Coupland *v.* Challis, ... 356
Cowan *v.* Davidson and Co., . 245
Cowan *v.* M'Micking, ... 239
Cox *v.* Hickman, . 49, 50, 55, 58, 197
Cox *v.* Mitchell, ... 560
Cox *v.* Stead, . 175, 428, 666, 791
Craddock *v.* Piper, ... 366
Cragg *v.* Ford, . . . 413, 415
Craig *v.* Brock and Ferguson, 542, 642
Craig *v.* Douglas, Heron, and Co., 354, 374, 407
Craig *v.* Fleming, ... 553
Craig *v.* Great North of Scotland Ra. Co., ... 592
Craig and Co. *v.* Hamilton, . . 374
Craven *v.* Widdows, ... 199
Crawford *v.* Chester and Holyhead Ra. Co., ... 488
Crawford *v.* Hamilton, . . . 683
Crawford *v.* M'Cormick, . . 347
Crawford *v.* Mitchell, . . . 543
Crawford *v.* North-Eastern Ra. Co., 382, 577
Crawford *v.* Stirling, ... 236
Crawshay *v.* Collins, 183, 415, 657, 666, 669, 688
Crawshay *v.* Maule, 657, 663, 666, 667
Creighton *v.* Rankin, ... 544
Crellin *v.* Brook, . . . 199, 200
Croft *v.* Day, ... 676
Croft *v.* London and North-Western Ra. Co., . . . 471, 502
Croker *v.* Stevenston Coll. Co., . 364
Croll *v.* Scottish Central Ra. Co., . 375
Crombie *v.* M'Ewan, ... 641
Cromford Canal Co. *v.* Cutts, 497, 498, 502
Cromford Ra. Co. *v.* Lacy, . . 74
Cropper's case, ... 413, 714
Crossfield's case, ... 722
Crouch *v.* London and North-Western Ra. Co., ... 515
Croxton's case, . 409, 410, 723, 730
Crum and Co. *v.* M'Lean, . . 247
Crutwell *v.* Lye, . . 431, 676
Culcreuch Cotton Co. *v.* Mathie, 243, 537, 541
Cullen *v.* Black, ... 617
Cullen *v.* Johnstone, . 335, 336, 858
Cullen *v.* Kerr, ... 146
Cullen *v.* M'Farlane, . . 782, 785
Cullen *v.* Thomson and Kerr, 363, 858
Cunliff *v.* Manchester and Bolton Canal Co., ... 578
Cunningham *v.* Edinburgh and Northern Ra. Co., . . 474, 503, 580
Cunningham *v.* Home, . . . 631
Cunningham *v.* Kinnear, . . 66
Cunningham *v.* Warner, . . 178

PAGE

Cupper's case, ... 730
Currie *v.* Glen, ... 530
Currie's case, ... 720
Curtis *v.* Perry, ... 174
Cutbill *v.* Kingdom, ... 110

Dakin *v.* London and North-Western Ra. Co., ... 471
Dale *v.* Dumbarton Glasswork Co., 362
Dale *v.* Hamilton, ... 353
Dalgleish *v.* Sorley, . 309, 658, 690
Dalgleish *v.* Stirling and Dunfermline Ra. Co., . . 441, 469, 579
Dalry, Heritors of, *v.* Newall and Others, 537
Dalrymple *v.* Halket, ... 138
Dalrymple *v.* M'Gill, ... 263
Dalton *v.* Midland Ra. Co., . . 383
Daniel's case, *in re* The Universal Provident Life Association, 720, 724
Daniel *v.* Cross, ... 273
Daniel *ex parte*, ... 726
Darby *v.* Darby, ... 178
Darbey *v.* Whitaker, ... 672
Darnley *v.* London, Chatham, and Dover Ra. Co., ... 496
Darvill *v.* Roper, ... 497
David *v.* Ellice, . . 273, 274, 308
Davidson's case, ... 720
Davidson *v.* Murray, ... 631
Davidson *v.* Napier, ... 573
Davidson *v.* Rankine, . 272, 308, 690
Davidson *v.* Robertson, 40, 234, 372, 608
Davies *ex parte*, ... 718
Davies *v.* Hodgson, . . 318, 431
Davis *v.* Amer, . . 573, 586, 674
Davis *v.* Cary, ... 745
Davis *v.* Hawkins, ... 109
Dawson *v.* Cullen, ... 642
Dawson *v.* Paver, ... 580
Dawson's Trs. *v.* Macleans, . . 578
De Berenger *v.* Hammel, . . 660
De Cosse Brissac *v.* Rathbone, . 561
Dee's case, ... 708
De Mautort *v.* Saunders, . . 246
Dearden *v.* Townsend, . . . lxvii
Dempster *v.* Masters and Seamen of Dundee, ... 35
Dennistoun, MacNair, and Co., *v.* Macfarlane, ... 169, 170
Dennistoun *v.* Mudie, . . 23, 24
Dennistoun *v.* Newbigging, . 756, 792
Denton *v.* Great Northern Ra. Co., 349
Denton *v.* Rodie, ... 344
De Pass's case, ... 328
Deposit Life Assurance Co. *v.* Ayscough, 166
De Tastet *v.* Bordenave, . 318, 675
Devaynes *v.* Noble (Clayton's case), 59, 254, 267, 268, 269, 691

PAGE

Dewar *v.* Miller, . . 216, 229, 248
Dewar *v.* Munnoch, ... 550
Dewar *v.* Nairne, ... 363
De Winton *v.* Brecon, etc., . . 222
Dickinson *v.* Valpy, 58, 199, 204, 229, 231, 292, 410
Dickson *v.* Cass, ... 313
Dickson *v.* Dickson, . . 107, 386
Dickson *v.* Dickson and Co., . . 255
Dickson *ex parte*, . . 659, 665
Dickson *v.* Henderson, . . 147, 252
Dickson *v.* Kerr, ... 532
Dickson and Sons *v.* Dickson and Co., 607
Digby *ex parte*, ... 53, 54
Dingwall *v.* M'Combie, 367, 761, 790
Dixon *ex parte*, ... 583
Dixon *v.* Hammond, ... 424
Dixon *v.* Ranken, ... 264
Dixon *v.* Dixon, . . . 586, 674
Dixon, Langdale, and Co. *v.* Cowan, 762
Dixons *v.* Monklands Canal Co., 348, 440
Dobell *v.* Stevens, ... 349
Dobbie *v.* Johnston, 304, 335, 336, 607, 795, 858
Dobbins and Bibby *v.* Stephenson and Co., ... 641
Dobson *v.* Christie, ... 424
Docker *v.* Sommes, . . 670, 691
Dodd *v.* Salisbury Ra. Co., . . 438
Dodgson *ex parte*, ... 60
Dolman *v.* Orchard, ... 318
Donald *v.* Humphrey, ... 491
Donaldson *v.* Donaldson's Trs., . 696
Donaldson *v.* Findlay and Co., . 236
Donaldson *v.* Williamson, . . 194
Doo *v.* London and Croydon Ra. Co., 447
Doubleday *v.* Muskett, . . . 60, 80
Douglas *v.* Caledonian Ra. Co., . 448
Douglas *v.* Craig, ... 762
Douglas *v.* Dundee and Newtyle Ra. Co., 581
Douglas *v.* Gordon and Co., . . 359
Douglas and Heron *v.* Armstrong, 642
Douglas, Heron, and Co. *v.* Blair, . 407
Douglas, Heron, and Co. *v.* Earl of Galloway, ... 564
Douglas, Heron, and Co. *v.* Gordon, 541
Douglas, Heron, and Co. *v.* Hair, 286, 316
Douglas *v.* Hunter, ... 776
Douglas *v.* Jones, . . 558, 635
Douglas *v.* Patrick, ... 534
Douglas *v.* Sanderson, . . . 776
Douglas, Wilson, and M'Caully *v.* Gordon and Co., . . 310, 680
Dove *v.* Wilkinson, ... 213
Downe *v.* M'Kinlay, ... 252
Downe *v.* Pitcairne, ... 545
Downes *v.* M'Fie and Co., . . 230
Downs *v.* Collins, . . . 352, 684
Doyle's case, ... 722

PAGE
Dremry *v.* Barnes, . . . 588
Drew *v.* Lumsden, . . . 725
Drouet *v.* Taylor, ... 79, 82
Drummond's case, . . . 721
Drummond *v.* Holliday, . 407, 548
Drummond *v.* Hunter, . 350, 354, 685
Drummond *v.* Macgregor, . . 262
Drummond *v.* Thomson's Trs., 63, 73, 143, 676
Drummond's Trs. *v.* Melville, . 691
Dry *v.* Boswell, ... 54
Drysdale *v.* Lawson, . 316, 585, 674
Dublin and Wicklow Ra. Co. *v.* Black, 166
Dudley Canal Co. *v.* Grazebrook, . 499
Duff *v.* East India Co., . . 534
Duffus and Others *v.* Mackay and Others, . . . 558, 636
Duke *v.* Andrews, . . 70, 72, 357
Duke *v.* Forbes, . . . 355, 357
Duke *v.* Dive, ... 162
Dumville *v.* Ashbrooke, . . 588
Dunbar *v.* Remington, Wilson, & Co., 310, 677
Duncan *v.* Forbes, . . 281, 282
Duncan *v.* Houstoun, . . . 748
Duncan *v.* Lowndes, . 236, 237, 250
Duncan *v.* Union Canal Co., 182, 415
Duncuft *v.* Albrecht, . . 147, 353
Dundas *v.* Belch, . . 533, 602, 795
Dundee and Aberdeen Ra. Co. *v.* Richardson, ... 452
Dundee Gas Co. *v.* Mags. of Dundee, 438
Dundee Gas Light Co. *v.* Dundee New Gas Light Co., . . . 582
Dundee and Newtyle Ra. Co. *v.* Miller and Soot, . . . 66, 527
Dundee Union Bank *v.* Dundee and Newtyle Ra. Co., . . . 357
Dunkeld, Bishop of, *v.* Balmerino, 99
Dunlop *v.* MacKellar, . . . 252
Dunlop *v.* Geils, ... 799
Dunlop *v.* Higgins, . . . 147
Dunlop *v.* Spiers, ... 754
Dunston *v.* Imperial Gas Co., . 211
Durham's case, ... 288
Duranty *ex parte*, ... 726
Dutch East India Co. *v.* Van Meyers, 556
Dutch West India Co. *v.* Moses, . 555
Duvergier *v.* Fellows, . . . 20
Dyce *v.* Paterson, ... 776
Dykes *v.* Watson, . . . 361

Eagle Co. *ex parte*, . . 206, 527
East of England Bank (Feltom's Executors' case), ... lxvii
East India Co. *v.* Blake, . . 411
East Lothian Ra. Co. *v.* Peffers, 71, 142, 164
East Lothian Bank *v.* Turnbull, 63, 73, 143, 354
Eastern Counties Ra. Co. *v.* Marriage, 472
Eastern Union Ra. Co. *v.* Bagshaw, 204
Eastern Union Ra. Co. *v.* Cochrane, 745
Easton *v.* Johnston, . . 280, 531
Eastwood *v.* Bain, . 115, 218, 233
Ede and Bond *v.* Findlay, Duff, and Co., ... 368, 426
Edgar *v.* Knapp, . . . 80, 239
Edinburgh and Glasgow Bank *v.* Ewan, 556, 561
Edinburgh and Glasgow Bank *v.* Steele, ... 245
Edinburgh and Glasgow Canal *v.* Earl of Hopetoun, ... 438
Edinburgh and Glasgow Ra. Co. *v.* Adamson, ... 375
Edinburgh and Glasgow Ra. Co. *v.* Arthur, ... 375
Edinburgh and Glasgow Ra. Co. *v.* Cadder Road Trustees, . 563, 564
Edinburgh and Glasgow Ra. Co. *v.* Campbell, ... 745
Edinburgh and Glasgow Ra. Co. *v.* Earl of Hopetoun, . . 564
Edinburgh and Glasgow Ra. Co. *v.* Hall, ... lxviii
Edinburgh and Glasgow Ra. Co. *v.* Magistrates of Linlithgow, 435, 437
Edinburgh and Glasgow Ra. Co. *v.* Meek, ... 375
Edinburgh and Glasgow Ra. Co. *v.* Monklands Ra. Co., 438, 446, 447, 580
Edinburgh and Glasgow Ra. Co. *v.* Stirling and Dunfermline Ra. Co., ... 365, 439
Edinburgh and Glasgow Ra. Co. *v.* Wauchope, ... 437
Edinburgh and Glasgow Union Canal *v.* Johnston, ... 264
Edinburgh and Leith Glass Co. *v.* North British Ra. Co., . 449, 455
Edinburgh and Leith Ra. Co. *v.* Hebblewhite, . 109, 157, 161
Edinburgh and Leith Ra. Co. *v.* Manson, ... 71
Edinburgh and Leith Shipping Co. *v.* Downe, ... 208
Edinburgh and Leith Shipping Co. *v.* Gillon, ... 553
Edinburgh and Newhaven Ra. Co. *v.* Sprott, ... 167, 342
Edinburgh Oil Gas Co. *v.* Clyne's Trs., 596, 860
Edinburgh, Perth, and Dundee Ra. Co. *v.* Arthur, . . . 375
Edinburgh, Perth, and Dundee Ra. Co. petr., . . . 464, 562
Edinburgh, Perth, and Dundee Ra. Co. *v.* Hope, ... 470

PAGE
Edinburgh, Perth, and Dundee Ra. Co. *v.* Leven, . . 447, 455
Edinburgh, Perth, and Dundee Ra. Co. *v.* North British Ra. Co., 527, 581
Edinburgh, Perth, and Dundee Ra. Co. *v.* Philip, . . . 440
Edinburgh Water Co. *v.* Bell, . 361
Edinburgh Water Co. *v.* Hay, . 485
Edmiston *v.* Wright, . . . 410
Edmonston *v.* Thompson, . . 57
Edwards *v.* Camerons, Coalbrook, and Co., ... 231, 233
Edwards *v.* Grand Junction Ra. Co., 84
Edwards *v.* Hooper, . . . 313
Edwards v. Shrewsbury Ra. Co., . 575
Elder *v.* Croal, ... 263
Electric Telegraph Co. of Ireland, *in re*, . . . 132, 133, 665
Elibank, Lord, petr., . . 462, 468
Ellis and Co. *v.* Finlayson, . . 360
Elliot *v.* South Devon Ra. Co., 472, 487
Ellis *v.* Coleman, . . 204, 207, 210
Ellis *ex parte*, ... 709
Ellis, petr., ... 659, 665
Ellis *v.* Smoeck, ... 59
Ellis *v.* Walker, ... 142
Elton, Hammond, and Co. *v.* Nielson, 359
Elwood *v.* Bullock, . . . 506
Emly *ex parte*, ... 233
Emly *v.* Lye, . . 219, 233, 247
Emmet *v.* Bradley, . . . 318
Endo *v.* Caleham, . . . 402
England *v.* Curling, . 184, 353, 573
Era Life Insurance Co., *in re*, . 742
Ernest *v.* Nicholls, 110, 204, 206, 213
Erskine *v.* Aberdeen Ra. Co., . 467
Erskine *v.* Cormack, . . . 349
Essell *v.* Hayward, . . . 660
Essex *v.* Essex, ... 178
Estwick *v.* Conningsby, . . 674
Etherton *v.* Burney, . . . 202
Evans *v.* Coventry, . 152, 415, 585
Evans *v.* Drummond, . . 272, 315
Evans *v.* Richardson, . . . 28
Evans *v.* Yetherd, . . . 414
Everet *v.* Williams, . . . 17
Ewing *v.* Chrichton, . 172, 400, 604
Ewing, May, and Co. *v.* Johnston and M'Quoid, ... 367
Ewing *v.* M'Clelland, 627, 628, 633, 634, 647, 758
Ewing *v.* Wright, . . . 360
Ewing *v.* York, ... 489
Eyre *ex parte*, ... 255

Factage Parisien, *in re*, . . 709
Fairbairn *v.* Pearson, . . . 585
Fairholm *v.* Marjoribanks, . . 60
PAGE
Fairlie *v.* M'Gown, . . . 453
Fairthorne *v.* Weston, . . . 398
Falconer *v.* Aberdeen Ra. Co., 454, 455, 460, 478, 502
Falls *v.* Belfast and Ballymena Ra. Co., 472
Farlow *ex parte*, ... 502
Farquharson *v.* Stott, . . . 696
Farr *v.* Pearce, . 318, 430, 431, 675
Farrar *v.* Beswick, . . . 378
Farrar *v.* Deflinne, . . . 315
Farrar *v.* Hutchinson, . . . 534
Farrar and Booth *v.* North British Bank, ... 426
Farries *v.* Smith, ... 374
Farrington *v.* Chute, . . . 402
Faulds *v.* Townsend, . . . 363
Fawcett *v.* York and North Midland Ra. Co., ... 492
Fawcett *v.* Whitehouse, 82, 209, 331, 397
Fearnside and Deans' case, . . lxvi
Featherstonhaugh *v.* Fenwick, 152, 175, 183, 210, 331, 657, 658, 666, 669, 688
Featherstonhaugh *v.* Lee Moor Porcelain Co., ... lxvi
Featherstonehaugh *v.* Turner, 183, 356, 670
Feltom's case, ... lxvi
Fenton *v.* Livingstone, . . . 560
Fenwick's case, . . . 721, 723
Ferguson *v* Grahame, 66, 136, 377, 668
Ferguson *v.* London, Brighton, and South Coast Ra. Co., . . 471
Ferm *v.* Harrison, . . . 198
Ferrier *v.* Alison, ... 453
Ferrier *v.* Berry, ... 793
Ferrier *v.* Dodds, ... 245
Fife *v.* Swaby, ... 575
Fife Bank *v.* Holliday, . . . 397
Fife and Kinross Ra. Co. *v.* Deas, 207, 473, 503
Fife and Kinross Ra. Co. *v.* Gentle, 72, 167
Figes *v.* Cutler, ... 354
Findlater *v.* Dunmore and Co., . 559
Findlay *v.* Fleming and Co., . 245
Findlay, Bannatyne, and Co. *v.* Ord, 678, 771, 780
Finkle *v.* Stacy, ... 47
Finlay *v.* Thomson, . . . 264
Finlay and Co. *v.* Campbell, . 596
Finlayson *v.* Braidbar Quarry Co., 247, 332, 413
Finlayson *v.* Rutherford, . . 378
Finnie *v.* Glasgow and South-Western Ra. Co., . . . 513, 580
Fisher *v.* Hepburn and Syme, 545, 554, 624, 641
Fisher *v.* Taylor, . . 133, 216, 292
Fleming *v.* Ballantyne, 243, 282, 537, 544, 623, 624, 774
Fleming *v.* Caledonian Ra. Co., 469, 582

PAGE
Fleming *v.* Campbell and Others, 107, 190, 204, 387, 411, 577
Fleming *v.* Finlay and Co., . . 424
Fleming *v.* Hector, . . . 46
Fleming *v.* Newton, . . . 571
Fleming *v.* Twaddle, . . . 642
Fletcher *v.* Dyche, . . . 424
Fletcher *v.* Great Western Ra. Co., 497, 498, 502
Fletcher *v.* Marshall, . . . 146
Flowerdew *v.* Dundee Shipping Co., 380, 400
Flowerdew *v.* Laing, . 374, 401, 668
Ffooks *v.* South-Western Ra. Co., 145
Fooks *v.* Wilts, Somerset, and Weymouth Ra. Co., . . . 579
Forbes *v* Duffus, ... 530
Forbes *v.* Edinburgh Water Co., . 374
Forbes *v.* Forrester's Exrs., . . 760
Forbes *v.* Gallie, . . . 639
Forbes *v.* Innes, ... 269
Forbes *v.* Manson, . . 759, 774
Forbes *v.* York Buildings Co., . 650
Forbes and Co. *v.* Dundas, . . 361
Fordyce *v.* Bridges, . . . 638
Fordyce *v.* York Buildings Co., . 762
Forman *v.* Homfray, . . . 398
Forrest *v.* Borthwick, . . . 784
Forrest *v.* Campbell, . . . 25
Forrest *ex parte*, . 714 (2 Giff. 42)
Forrest *v.* Manchester Ra. Co., 205, 576
Forrester *v.* Bell, ... 62
Forrester *v.* M'Kenzie, . . . 783
Forster *v.* Hale, ... 173
Forster *v.* Lawson, . . . 346
Forster *v.* Orr's Trs., . . 668, 670
Forsyth *v.* Hare and Co., 242, 541, 542, 543, 567, 623
Forth and Clyde Canal Co., . . 376
Forth and Clyde Ra. Co., *v.* Ewing, 450
Forth Marine Insurance Co. *v.* Burness (Burness *v.* Pennel), 74, 203, 260, 261.
Fortune *v.* Edinburgh and Bathgate Ra. Co., ... 460
Fortune *v.* Luke, ... 372
Fosdick *v.* North British Ra. Co., . 362
Foss *v.* Harbottle, . 109, 210, 577
Fox *v.* Clifton, . . 58, 62, 63, 70, 72
Fox *v.* Hanbury, . . 313, 664
Foulds *v.* Thomson, . . . 145
Fowler *v.* Wyatt, ... 402
Franklyn *v.* Lamond, . . 146, 147
Fraser, petr., ... 798
Fraser *v.* Burnet, ... 564
Fraser *v.* Dunlop, . . 263, 363
Fraser *v.* Edinburgh and Glasgow Union Canal Co., . . . 580
Fraser *v.* Hair, 18, 66, 396, 401, 654, 853
Fraser *v.* Hill, . . 66, 400, 413, 654
PAGE
Fraser *v.* Kershaw, 346, 586, 673, 674
Fraser *v.* Lovat, ... 462
Faser *v.* Whalley, etc., . . 575
Fraser, Reid, and Sons *v.* Lancaster and Jamieson, ... 642
Frayes *v.* Worms, . . . 561
French *v.* Andrade, . . . 271
French *v.* Backhouse, . . . 239
French *v.* Styring, . . . 51
Freeman *v.* Cooke, . . . 58
Freeman *ex parte*, . . 296, 302
Freeman *v.* Fairlie, . . . 388
Freeland *v.* Stansfield, . 355, 573, 586
Friendly Insurance Co. *v.* Royal Bank, 564
Fripp *v.* Chard Ra. Co., . . 588
Frost *v* Moulton, . . . 657
Frowd *ex parte*, ... 725
Fry *ex parte*, ... 296
Fullarton *v.* Dixon, . 586, 587, 674
Furlong *v.* M'Nair, . . . 785
Furnival *v.* Weston, . . . 536
Fyfe *v.* Carfrae, ... 283
Fyfe *v.* Kedslie, ... 694
Fyffe *v.* Fergusson, . 558, 680, 692

Gabriel *v.* Evill, ... 61
Gainsford *v.* Carroll, . . . 251
Gale *v.* Leckie, ... 354
Gall *v.* Bird, ... 618
Gallie, etc., *v.* Wilson's Trs., . 853
Gallie *v.* Wyllie, ... 752
Galloway *v.* Henderson, . . 774
Galloway *v.* Liddell and Reid, 367, 558, 636
Galloway *v.* Ranken, . . . 504
Galvanized Iron Co. *v.* Westoby, 63, 72, 165
Galway *v.* Matthew, 200, 216, 230, 248
Gammeil, petr., ... 464
Garden and Son's Sequestration (MacKellar's case), . . 783
Gardiner *v.* Childs, . . . 213
Gardner *v.* Anderson, . . 58, 318, 854
Gardner *v.* Trinity House of Leith, 179
Gardner *v.* Charing Cross Ra. Co., 472
Gardner *v.* M'Cutchen, . . 185
Gardners *v.* Royal Bank, . 384, 427
Gardom *ex parte*, ... 236
Garland *ex parte*, . 53, 326, 691, 692
Garrard *v.* Hardy, . . . 20
Garwood *v.* Ede, . . 82, 356
Gaskell *v.* Chambers, . . 210, 569
Gattke's case, ... 501
Gault *v.* M'Aulay, . . . 50
Geddes *v.* Hamilton, . . 183, 415
Geddes *v.* Hopkirk, . . 525, 550
Geddes *v.* Wallace, . . 48, 407, 815
Geils, petr., ... 462
Gemmel *v.* Barclay, . . . 546

PAGE
Gemmel *ex parte*, ... 428
General International Agency Co., *in re*, ... 730
General Assembly of Baptist Churches *v.* Taylor, ... 603
General Indemnity Assurance Co., 729
Gerhard's case, ... 259
Gerhard *v.* Bates, . . 82, 259, 349
German Mining Co.'s case, . . 412
Gibb *v.* Wathen and Co., . . 256
Gibson's case, . . . 726, 730
Gibson *v.* Lupton, ... 47
Gibson *v.* Smith, . . . 551, 558
Gibson *v.* Stewart, 175, 182, 345, 400, 413, 526, 534, 654
Gibson Craig, Sir James, *v.* Aitken, 63, 73, 144, 354
Gilbert *v.* Cooper, . . . 576
Gilfillan *v.* Brown, . . . 530
Gilfillan *v.* Henderson, . . . 18
Gillan *v.* Morrison, . . . 413
Gillespie *v.* Clark, . . . 679
Gillespie *v.* Hamilton, . . . 663
Gillespie *v.* Young, . . . 100
Gillies *v.* Hunter, . . . 546
Gilmour *v.* Stewart's Reps., . 281
Gilpin *v.* Enderbey, . . . 51
Glasgow and Airdrie Ra. Co. *v.* Tennent, . . . 548, 550, 568
Glasgow and Ardrossan Canal Co. *v.* Glasgow and Greenock Ra. Co., 444
Glasgow and Ayr Ra. Co. *v.* Abbey Parish of Paisley, . . . 375
Glasgow and Barrhead Ra. Co. *v.* Caledonian Ra. Co., 375, 583, 588
Glasgow, Barrhead, and Neilston Ra. Co. *v.* Nitshill Coal Co., 452, 459, 502
Glasgow and Garnkirk Ra. Co., petr., 588
Glasgow and Greenock Ra. Co. *v.* Glasgow and Airdrie Ra. Co., 438, 488
Glasgow and Monklands Ra. Co. *v.* Glasgow Waterworks Co., 447, 455
Glasgow Water Co. *v.* Kellar, . 440
Glass *v.* Hutton, ... 216
Glassington *v.* Thwaites . 184, 573
Gleadon *v.* Tinkler, . . . 248
Gleadow *v.* Hull Glass Co., . 409, 410
Gledhill's case, ... 720
Globe Insurance Co. *v.* Scott's Trs., 633
Globe Insurance Co. *v.* Tytler, . 649
Gloucester, Aberystwith, and Central Wales Ra. Co., *in re*, . . 714
Glover *v.* North Stafford Ra. Co., . 502
Glyn *v.* Hood, . . . 141, 663
Goddard *v.* Hodges, . . . 328
Godfrey *v.* Turnbull, . . . 310
Goldie *v.* Gray, ... 752
Goldie *v.* Oswald, . . . 441, 563
Golding *v.* Vaughan, . . . 271

PAGE
Goode *v.* Harrison, . . . 25
Goodman *v.* De Beauvoir, . . 525
Goodman *v.* Whitcomb, 108, 386, 388, 584, 660
Goodsir *v.* Carruthers, . . . 366
Goodyer *v.* Shaw, . . . 33
Gordon's case, . . . 721, 723
Gordon *v.* Anderson, . . . 326
Gordon *v.* Assurance Co., . . 231
Gordon *v.* Cheltenham and Great Western Ra. Co., . . . 488
Gordon *v.* Cheyne, . . 367, 790
Gordon *v.* Douglas, Heron, and Co., 534, 673
Gordon *v.* Howden, 18, 400, 413, 414, 415, 654, 673, 680
Gordon *v.* M'Cubbin, 372, 678, 770, 780, 785
Gordon *v.* Rutherford, . . . 403
Gordon *v.* Sutherland, . . . 229
Gordon *v.* Tolmie, . . . 776
Gorham *v.* Thompson, . . . 310
Gorton *v.* Bristol Ra. Co., . . 517
Gough *v.* Davies, . . . 273, 308
Gould *v.* Stafford Potteries Waterworks Co., ... 453
Gouthwaite's case, . . . 401
Gouthwaite *ex parte*, . . . 722
Gouthwaite *v.* Duckworth, . . 293
Governor and Company of Bank of England, ... 35
Gow *v.* Macdonald, 282, 283, 531, 608
Grace *v.* Smith, ... 53
Graham *v.* Caledonian Ra. Co., 466, 468, 564
Graham *v.* Garnkirk Ra. Co., . 436
Graham *v.* Henderson, . . . 309
Graham *v.* Hope, ... 310
Graham *v.* Keble, . . . 680, 693
Graham *v.* North British Bank, 107, 190, 258, 335, 576
Graham *v.* Sprot, . . . 606
Graham *v.* Van Diemen's Land Co., 110
Graham *v.* Western Bank, 261, 653, 654, 725, 859
Graham *v.* Whichelo, . . . 316
Graham *v.* Writers to the Signet, 504, 526
Grand Junction Ra. Co. *v.* White, 496
Grant, petr., ... 799
Grant *v.* Chalmers, . . 316, 673
Grant *v.* Creditors of York Buildings Co., 283
Grant *v.* Edinburgh and Dundee Ra. Co., ... 467, 468
Grant *v.* Girdwood and Co., . 596, 678
Grant *v.* Gordon, ... 564
Grant *v.* Hawkes, ... 230
Grant *v.* Jackson, . . . 533
Gray *v.* Brassey, ... 264
Gray *v.* Douglas, Heron, and Co., 406, 668
Gray *v.* Haigh, ... 391
Gray *v.* Polhill and Others, . 635, 767
Gray *v.* Smith, ... 37

PAGE

Gray *v.* Illidge and Pohill, . . 558
Gray *v.* Liverpool and Bury Ra. Co., 581
Gray, Lord, and Others, petrs., . 366
Great Luxembourg Ra. Co. *v.* Magnay, 209, 210
Great Northern Ra. Co. *v.* Clark, 153, 156
Great Northern Ra. Co. *v.* Eastern Counties Ra. Co., . . 439, 576
Great Northern Ra. Co. *ex parte*, . 470
Great Northern Ra. Co. *v.* Inglis, 105, 106, 111, 153, 156, 159, 160, 163, 243, 604, 607
Great Northern Ra. Co. *v.* Shepherd, 514
Great Western Ra. Co. *v.* Attorney-General, ... lxviii
Great Western Ra. Co. *v.* Goodman, 506
Greatrix *v.* Greatrix, . . 388, 573
Green *v.* Beesley, ... 46
Green *v.* Briggs, ... 51
Green *v.* Deakin, ... 249
Green *v.* Gardiner, . . . 262
Green *v.* Nixon, ... 204
Greenshield's case, . . . 722
Greenwood's case, . . . 287
Greenslade *v.* Dower, . 216, 229, 292
Greesham *v.* Gray, . . . 46
Greig *v.* Mags. of Kirkcaldy, . 374
Griswold *v.* Waddington, . . 28, 664
Grizewood *v.* Blane, . . . 145
Grizewood *ex parte*, . . . 145
Grizewood and Smith *ex parte*, . 726
Grosvenor *v.* Hampstead Junction Ra. Co., ... 471
Guthrie *v.* Cowan, . . . 563
Guthrie *v.* Glasgow and South-Western Ra. Co., ... 454
Guthrie *v.* Millar, . . . 564
Gye and Co. *v.* Hallam, . 363, 608

Haddon *v.* Ayres, . 152, 207, 238, 332
Hague *v.* Dandeson, . . . 385
Hague *v.* Rolleston, . . . 313
Haig *v.* Gray, ... 681
Hale *v.* Hale, . . . 585, 666
Halford *v.* Cameron's Coalbrook Co., 231
Halkett *v.* Merchant Trades' Association, ... 288
Hall's case, ... 328
Hall *v.* Burrows, ... 688
Hall *v.* Connell, ... 389
Hall *v.* Hall, . 432, 573, 584, 658
Hallett *v.* Dowdall, . . . 288
Hamer's Devisees' case, . . 312
Hamil *v.* Stokes, ... 355
Hamilton *ex parte*, . . . 659
Hamilton, Duke of, . . . 462
Hamilton *v.* University of Glasgow, 179
Hamilton, petr., ... 640
Hamilton *v.* Caledonian Ra. Co., 513, 582

PAGE

Hamilton *v.* Dutch East India Co., 556, 558, 561
Hamilton *v.* Geddes, . . . 182
Hamilton *v.* Landale, . . . 864
Hamilton *v.* M'Gilp, . . 596, 678
Hammond *v.* Douglas, . . . 431
Hamper *ex parte*, . . . 53, 54, 175
Hampton *v.* Adam, . . 198, 245
Hancock *v.* Hodgson, . . . 288
Handyside *v.* Harwood, . 270, 418
Hannuic *v.* Goldner, . . . 146
Hardcastle *v.* South Yorkshire Ra. Co., 496
Harding *v.* Glover, . . . 585
Hardinge *v.* Webster, . . 275, 742
Hardy *v.* Allan, ... 530
Hare *v.* London and North-Western Ra. Co., ... 439
Harford and Co. *v.* Robertson, . 374
Harkins *v.* Smith, . . . 361
Harman *v.* Johnson, . . . 255
Harrington *v.* Churchyard, . . 48
Harris *ex parte*, . . . 200, 233
Harris *v.* Cockermouth Ra. Co., . 517
Harris *v.* Farwell, . . . 273
Harris *v.* Harris, . . . 401
Harris *v.* North Devon Ra. Co., 153, 381, 575
Harrison *v.* Armitage, . . . 584
Harrison *v.* Bevington, . . 346
Harrison *v.* Gardner, . 431, 432, 676
Harrison *v.* Jackson, . . 201, 220
Harrison *v.* Tennant, . . 660, 661
Hart *v.* Alexander, . 272, 308, 310
Harvey *v.* Crickett, . . . 313
Harwood *v.* Edwards, . . . 525
Hasleham *v.* Young, . . . 236
Hassell *v.* Merchant Traders' Association, ... 288
Hattersley *v.* Earl of Shelburne, 576, 577, 578
Hatton's case, . . . 328, 721
Hatton *ex parte*, ... 724
Hatton *v.* Royle, ... 529
Hauslip *v.* Kitton, . . 136, 379
Hawkins *v.* Rutt, ... 569
Hawkins *v.* Wedderburn, . . 403
Hawkshaw *v.* Parkins, . . . 533
Hawtayne *v.* Bourne, 199, 216, 219, 410
Hay *v.* Edinburgh Water Co., . 376
Hay *v.* Mair, ... 315
Hay *v.* Miller, ... 799
Hay *v.* North British Ra. Co., 495, 865
Haynes *v.* Haynes, . . . 447
Hayter Granite Co., *in re*, . . lxviii
Haythorne *v.* Lawson, . . . 346
Healey *v.* Thames Valley Ra. Co., . 449
Heath *v.* Percival, . . . 274
Heath *v.* Sansom, . . 315, 663
Heaton *ex parte*, . . . 255, 536

PAGE

Hedges *v.* Metropolitan Ra. Co., . 448
Hedley *v.* Bainbridge, . . . 229
Heggie *v.* Heggie, . . . 423
Helsby *v.* Mears, ... 296
Henderson *v.* Wild, . . 533, 534
Hendry's Trs. *v.* Renton, . . 596
Hennessy's Executors' case, . . 23
Henriques *v.* Dutch West India Co., 556
Henry *v.* Great Northern Ra. Co., 382, 577
Hepburn, ... 464
Hercules Insurance Co. *v.* Hunter, 564
Herries and Co. *v.* Burnett, . . 649
Hervey *v.* Birch, ... 352
Hickens *v.* Congreve, . . . 82, 209
Hickman *v.* Cox, ... 50, 53
Higgins *v.* Senior, . . . 246
Higgins and Sons *v.* Dunlop and Co., 252
Hill *v.* Dundee and Aberdeen Ra. Co., ... 452
Hill *v.* Edinburgh and Glasgow Ra. Co., . . . 107, 109, 126
Hill *v.* Glasgow College, . . 631
Hill *v.* Fairweather, . . . 37, 98
Hill *v.* Lindsay, 144, 350, 368, 422, 536, 604, 605
Hill *v.* Manchester Waterworks, 111, 527
Hill *v.* Merchant Co. of Edinburgh, 179
Hill *v.* Merricks, . . . 263, 363
Hill *v.* Wylie, ... 352
Hills *v.* Nash, ... 397
Hilton *v.* Fairclough, . . . 569
Hinds *ex parte*, ... 173
Hirst *v.* Tolson, ... 355
Hitchcock's case, . . . 720, 721
Hitchins *v.* Kilkenny Ra. Co., . 81, 322
Hoare's case, . . 217, 412, 721
Hoare *v.* Dawes, ... 47
Hobkin *v.* Hog, . . . 331, 379
Hoby *v.* Roebuck, . . . 293
Hodgkinson *v.* National Live Stock Insurance Co., . . 152, 575
Hodgson *v.* Earl Powis, . 576, 581
Hodgson *v.* Temple, . . . 19
Hog *v.* Hog, ... 694
Hogan *v.* Wilson and Magistrates of Musselburgh, . . . 748
Hogarth and Co. *v.* Gordon's Trs., 865
Hogg *v.* Muir, Wood, and Co., 368, 371
Hogg *v.* Weir, ... 233
Holdsworth *ex parte*, . . 691, 692
Hole *v.* Sittingbourne and Sheerness Ra. Co., ... 489
Holland *v.* King, ... 684
Holmes' case, ... 723
Holmes *v.* Blogg, ... 24
Holmes *v.* Henderson, . . 627, 624
Holmes *v.* Higgins, . . . 76, 81
Holt's case, . . . 152, 724, 725
Holt *v.* Ward, ... 25

PAGE

Homersham *v.* Wolverhampton Waterworks Co., ... 219
Homfray *v.* Fothergill, . . . lxvi
Hooper *v.* Lusby, ... 240
Hop and Malt Exchange and Warehouse Co. (*ex parte* Briggs), . lxvi
Hope *v.* Cust, . . 200, 236, 249
Hope *v.* Lyon, ... 146
Hopkins' case, ... 715
Hopkins *v.* Great Northern Ra. Co., 488
Hosie *v.* Edinburgh and Glasgow Ra. Co., ... 581
Hoskins *v.* Christie, . 369, 407, 757
Hotchkis *v.* Royal Bank, . 270, 423
Houghton *ex parte*, . . . 174
Houldsworth *v.* Walker, . . 606
Hounsell *v.* Smyth, . . . 496
Houstoun *v.* Aberdeen Town and County Bank, . . . 639
Houstoun *v.* Lady Montgomerie, 348, 412, 427
Houstoun *v.* Yuill, . . . 280
Houston's Exrs. *v.* Speirs, . . 269
How *v.* Bank of England, . . 798
Howden *ex parte*, . . . 221
Howden *v.* Corporation of Goldsmiths, 34
Howden *v.* Kennedy, . . . 167
Howell *v.* Brodie, ... 66
Howey and Co. *v.* Lovell, . . 331
Howie *v.* Anderson, . . . 147
Hoyle *v.* Shaws Water Co., . 580, 581
Hozier *v.* Caledonian Ra. Co., . 517
Hubert *v.* Nelson, ... 199
Hudson *v.* Leeds Ra. Co., . . 469
Hudson *v.* York and North Midland Ra. Co., ... 209
Hue *ex parte*, ... 723
Humble *v.* Langston, . 148, 164, 167
Hume *v.* Baillie, ... 631
Hunt *v.* Royal Exchange Insurance Co., 240
Hunter's case, ... 730
Hunter *v.* Carron Co., . . . lxviii
Hunter *v.* Cochrane's Trs., 182, 398, 399, 402, 415, 596
Hunter *v.* Edinburgh and Glasgow Canal Co., . . 263, 363
Hunter *v.* Evans, Foster, and Langton, 309, 643, 663, 798, 799
Hunter *v.* Fleming and Strang, . 374
Hunter *v.* Lees, ... 631
Hunter *v.* North British Ra. Co., 478, 501, 502
Hunter *v.* Stewart, . . . 559
Hunter and Co. *v.* Levy and Co., . 374
Hunter and Co. *v.* Speirs, . 236, 361
Hunter and Co. *v.* Spens, . . 361
Hurlett and Campsie Alum Co. *v.* Earl of Glasgow, ... 364
Hutcheson *v.* Halkett, . . . 158

PAGE

Hutchinson *v.* Wright, . . . 398
Hutchison *v.* Edinburgh and Glasgow Railway Co., ... 563
Hutchison *v.* Manchester, etc., Ra. Co., 470
Hutchison *v.* Smith, . . 182, 415
Hutchison and Co. *v.* Scott, . . 374
Hutton *v.* Eyre, ... 276
Hutton *v.* Rossiter, . . . 692
Hutton *v.* Thompson, . . . 62
Hyam *ex parte*, ... 724
Hyde *v.* Great Western Ra. Co., . 579
Hyde and MacGregor *v.* Allan and Sons, 798

Illingworth *v.* Manchester and Leeds Ra. Co., ... 581
Imrie *v.* Lumsden, . . . 730
Inches *v.* Elder, ... 363
Inderwick *v.* Snell, . . . 577
Inge *v.* Birmingham, Wolverhampton, and Stour Valley Ra. Co., . 502
Inglis *v.* Austine and Others, 174, 183, 331
Inglis *v.* Cunningham, . . . 605
Inglis *v.* Douglas, 334, 335, 336, 653, 857
Inglis *v.* Lane, ... 553
Inglis *v.* Lumsden, . 259, 304, 730
Inglis and Co. *v.* Cuthbertson, 270, 418
Innes, petr., ... 462, 464
Irish Peat Co. *v.* Phillips, . . 73
Ironside *v.* Gray, ... 797
Irvine *v.* Irvine, ... 685
Irvine *v.* Young, ... 402
Irving *v.* Houston, . . . 696
Irving *v.* Lead Mills Mining Co., . 580
Ivison *v.* Edinburgh Silk Yarn Co., 362, 604, 605

Jacand *v.* French, ... 536
Jacomb *v.* Harwood, . . . 690
Jackson *v.* Cocker, 70, 147, 164, 176
Jackson *ex parte*, . . . 296, 302
Jackson *v.* Sedgwick, . . 672, 815
Jacques *v.* Chambers, . . 164, 166
James, Wood, and James *v.* Downie, 367, 424, 631
Jameson *v.* Watson, . . . 552
Jardine *v.* M'Farlane, . . 239, 293
Jardine's Trs. *v.* Carron Iron Co., 258, 397
Jarvis *v.* Anderson, . . . 674
Jeffrey *v.* Crightons, . . 176, 761
Jefferys *v.* Gurr, ... 35
Jefferys *v.* Smith, . . . 657, 663
Jenkins *v.* Blizard, . . 309, 311
Jennings *v.* Baddeley, . . . 661
Jennings *v.* Broughton, . 70, 653
Jennings *v.* Great Northern Ra. Co., lxvii
Jervis *v.* White, ... 573
Jobson *v.* Ford, ... 245

PAGE

Joel *v.* Gill, ... 767
Johne's case, ... 311
Johnson *ex parte*, ... 415
Johnson *v.* Evans, ... 664
Johnson *v.* Hudson, . . . 19
Johnson *v.* Peck, ... 237
Johnstone *v.* Cliftonhill Coal Co., 232, 233, 243
Johnstone *v.* Dougal and Laird, . 800
Johnston *v.* Duncan, . . 525, 553
Johnstone *v* Fairholme and Co., . 748
Johnston *v.* Losh, . . . 781
Johnston *v.* Scott, . 76, 78, 79, 604
Johnston *v.* Scott and Son, 368, 426, 427
Johnstone *v.* Vans Agnew, . . 646
Johnstone and Co. *v.* Phillips, 199, 216, 229, 249, 372
Johnston *v.* Vallance and Co., . 856
Johnston and Manly *v.* Findlay, Duff, and Co., ... 427
Jones, ... 82 (2 Ex. 52)
Jones *ex parte*, ... 725
Jones *v.* Great Western Ra. Co., . 579
Jones *v.* Harrison, . . . 356
Jones *v.* Maund, ... 269
Jones *v.* Noy, . . . 26, 659, 669
Jones *v.* Samuel, ... 636
Jones *v.* Welch, ... 660
Jones and Co. *v.* Ross, . . . 264
Josephs *v.* Pebrer, . . . 20, 145
Jubb *v.* Hull Dock Co., . 502, 503

Kay *v.* Pollock, ... 315
Keasley *v.* Codd, ... 287
Keating *v.* Marsh, ... 254
Keene's Executors' case, . 204, 722
Keir *v.* Hepburn, ... 645
Keir and Others *v.* Duke of Athole, 364
Keith *v.* Keir, ... 263
Keith *v.* Penn, . . 349, 379, 409, 414
Keith *v.* Smart, ... 257
Kemp *v.* Allan, . 310, 311, 360, 678
Kemp *v.* London and Brighton Ra. Co., ... 448, 579
Kempson *v.* Saunders, . . . 146
Kendal *v.* Campbell, . . 282, 531
Kennedy, petr., 199, 229, 236, 243, 247, 372
Kennedy *v.* Lee, . . 431, 585, 676
Kenney *v.* Walker, . 366, 604, 605
Kent Benefit Building Society's case, 218, 413
Kent *v.* Jackson, . . 190, 401, 577
Ker *v.* Magistrates of Kirkwall, . 283
Ker *v.* M'Ewen, ... 776
Kerr *v.* Bryson, ... 281
Kerr *v.* Clyde Shipping Co., . 537, 544
Kerr *v.* M'Kechnie, . . 299, 668
Kerr *v.* Scott, ... 420

	PAGE
Kerr *v.* Wood,	546
Kerridge *v.* Hesse,	79
Kershaw *v.* Matthews,	585, 663, 684
Kewly *v.* Andrew,	641
Key *v.* Stirling, etc.,	563
Kidwelly Canal Co. *v.* Raby,	70, 73
Kilgour *v.* Finlyson,	317
Killock *v.* Greg,	60
Kinder *v.* Taylor,	20
King *v.* Accumulative Assurance Co.,	657
King *v.* Bristol Dock Co.,	503
King *v.* Hamilton,	572
King *v.* Hoare,	275
King *v.* Thom,	328
King *v.* Wycombe Ra. Co.,	472
Kinnear *v.* Cunningham,	54
Kinnear *v.* Low,	774, 785
Kinnear *v.* Thomson,	316, 526, 682
Kirby *v.* Carr,	659, 660
Kirk *v.* Bell,	158, 207, 238
Kirk *v.* Blurton,	232
Kirk-session of South Leith *v.* Scott,	375
Kirkwood *v.* Cheetham,	58
Kirwan *v.* Kirwan,	273, 308
Kisch *v.* Ra. Co. of Vensuela (Limited),	725
Knapp *v.* Williams,	588
Knebell *v.* White,	398
Knight *v.* Barber,	145
Knox *v.* Crawford,	619
Knox *v.* Martin,	542, 627, 642
Knowles *v.* Haughton,	18
Kyle *v.* Thomson,	642, 643
Labouchere *v.* Tupper,	328
Lacy *v.* Kinaston,	276
Lacy *v.* Woolcott,	313
Laidlaw *v.* Hamilton,	280
Laing *v.* Caledonian Ra. Co.,	448, 452
Laird *v.* Laird,	255
L'Amert *v.* Heath,	146
Lanark Twist Co. *v.* Edmonstone,	440
Lancashire Brick Co.,	709
Lancaster and Carlisle Ra. Co. *v.* Maryport Ra. Co.,	448
Lane *v.* Williams,	229, 249
Lang *v.* Allan and Co.,	371
Lang *v.* Brown,	266, 269
Lang *v.* Craig,	563
Lang and Co. *v.* M'Leod,	246
Langmead's Trs., *in re*,	428
Latta's case,	708
Lauder *v.* Orr and Others,	71
Lauder *v.* Wingate,	597
Laurie *v.* Black,	427
Law *ex parte*,	234
Law and Co. *v.* Caledonian Ra. Co.,	493
Lawes' case,	110, 204
Lawrence *v.* Great Northern Ra. Co.,	503
Laws *v.* Round,	236
Lawson *v.* Drysdale,	855
Lawson *v.* Gordon,	537, 543
Lawson *v.* Morgan,	585
Lawson *v.* North British Ra. Co.,	503
Lawton *ex parte*,	708
Leach *v.* North Stafford Ra. Co.,	493
Leaf *v.* Coles,	659
Learmonth *v.* Adams and Co.,	63, 72, 73
Learmonth *v.* Governors of Trinity Hospital,	179
Learmonth *v.* Leadbetter,	375, 576
Learmonth and Co. *v.* Livingstone,	66
Leck *v.* Fulton,	364
Lee *v.* Milner,	581
Leeds and Thirsk Ra. Co. *v.* Fearnley,	24, 165
Leeds Banking Co. (Addinell's case),	lxvi
Leeson *v.* Holt,	311
Le Fanu *v.* Malcolmson,	346
Legg *v.* Mathieson,	222
Leifchild's case,	lxvi
Leigh *v.* Paterson,	251
Leishman *v.* Robertson,	647, 675
Leith Bank *v.* Bell,	360
Leith Bank *v.* Walker's Trs.,	373
Leith Harbour Commissioners *v.* Trinity Harbour Co.,	447
Lemere *v.* Elliot,	302
Lennan *v.* Miller and Addie,	364
Leslie *v.* Lumsden, etc.,	334
Leslie *v.* Magistrates of Brechin,	283
Leslie *v.* Lady Ashburton,	635
Leslie *v.* Sproat,	545
Leslie's Representatives *v.* Lumsden,	331, 334
Letts and Steer *ex parte*,	415
Lewis *v.* Baldwin,	556
Lewis *v.* Langdon,	318, 431, 675, 676
Lewis *v.* Reilly,	317
Lichfield *ex parte*,	23
Liddell and Co. *v.* Young and Son,	424, 426
Life Association of England (Limited),	735
Life Assurance Co. of England, *in re*,	731
Lindesay *v.* Inglis' Trs.,	407, 689
Lindsay *v.* Clelland,	765, 797
Lindsay *v.* Davidson,	789
Lindsay *v.* Giles,	789
Lindsay *v.* Great Northern Ra. Co.,	153, 156
Lindsay *v.* Johnston,	858
Lindsay *v.* London and North-Western Ra. Co.,	556, 558, 635, 636, 637
Lindsay *v.* Orr,	563
Lindsay *v.* Paterson,	578
Lindus *v.* Melrose,	115, 231, 235
Lingard *v.* Bromley,	415
Linwood *v.* Hawthorne,	263, 363
Liquidators of Western Bank *v.* Douglas,	304
Lister *v.* Lobley,	498

PAGE
Lister *v.* Sutor, 348, 374, 396, 401, 666, 667
Litchfield's case, ... 724
Little *v.* Nelson, ... 363
Little *v.* Newport and Hereford Ra. Co., 487, 488
Liverpool Borough Bank *v.* Walker, 328, 690
Livingston *v.* Gordon, ... 43
Livingston *v.* Kinloch, ... 630
Livingston *v.* Learmonth and Co., 647
Livy *v.* Mudie, ... 243
Llanharry Hæmatite Co., *in re*, . 126
Llanharry Hæmatite Iron Co. (Tothill's case), ... lxvi
Lloyd *v.* Ashly, ... 234, 293
Lloyd *v.* Crisp, ... 147
Lloyd *ex parte*, ... 221
Lloyd *v.* Freshfield, . . . 216, 247
Lloyd *v.* Loaring, ... 386
Lock *v.* Lynane, ... 184
Lockhart *v.* Ferrier, . 349, 369, 758
Lockhart *v.* Turner, ... 752
Lodge *v.* Dicas, ... 273, 308
Logan *v.* Brown, ... 43, 66
Logan *v.* Courtown, . 575, 577, 581
Logie *v.* Gordon, ... 190
Logy *v.* Durham, ... 54, 212
Londesborough *ex parte*, . . . 727
London and Birmingham Ra. Co. *v.* Grand Junction Canal Co., 489, 495
London and Brighton Ra. Co. *v.* Blake, 492
London and Brighton Ra. Co. *v.* Fairclough, ... 160
London and Brighton Ra. Co. *v.* Goodwin, ... 745
London and Continental Insurance Co. *v.* Redgrave, ... 62
London and County Assurance Co., *in re*, 218
London Dock Co. *v.* Sinnott, . . 204
London and Edinburgh Shipping Co. *v.* M'Corkle, 36, 537, 540, 541, 544, 624
London Grand Junction Ra. Co. *v.* Graham, . 104, 143, 163, 164, 165
London and Greenwich Ra. Co., *in re*, 460
London, Leith, and Glasgow Shipping Co. *v.* Ferguson, ... 362
London and Mercantile Discount Co. *in re*, ... lxvii
London and North-Western Ra. Co. *v.* Bradley, ... 502
London and North-Western Ra. Co. *v.* Lindsay, ... 565
London and North-Western Ra. Co. *v.* M'Michael, ... 159
London and North-Western Ra. Co. *v.* Quick, ... 453
London and North-Western Ra. Co. *v.* Scottish Central Ra. Co., . 576
London and North-Western Ra. Co. *v.* Skerton, ... 493
PAGE
London Ra. Co. *v.* Fairclough, . 167
Londonderry Ra. Co. (13 Q. B. 998), 163
Longworth's case, ... 111
Longworth *ex parte*, ... 414
Lord *v.* Governor and Co. of Copper Miners, ... 190, 577
Lord Advocate *v.* Hill, ... 695
Lords of the Treasury *v.* M'Nair, 367, 755
Los *ex parte*, ... 719
Loscomb *v.* Russell, ... 398
Lothian *v.* Carron Iron Co., . . 257
Love *v.* Anderson, ... 776
Love *v.* Foster, ... 641
Lovegrove *v.* Nelson, ... 141
Lovel *v.* Hicks, ... 256
Low *v.* Bell, ... 548
Low *v.* Duncan, ... 548
Low *v.* Lizars, ... 366, 779
Lowndes *v.* Garnet Mining Co. (Limited), 714
Luard's case, ... 721
Luard *ex parte*, ... 717
Lucas *v.* Beach, ... 76, 81
Lucas *v.* De la Cour, ... 533
Lucas *v.* Wilkinson, ... 266
Lucy's case, ... 730
Lumsden *v.* Allan, ... 424
Lumsden *v.* Buchanan, 326, 327, 367
Lumsden *v.* Gordon, . . 528, 529
Lumsden *v.* Russell, ... 363
Lumsden and Others (Liquidators of Western Bank), petrs., . . 728
Lund *ex parte*, ... 724
Lusk *v.* Elder, . . 349, 369, 754
Lyon *v.* Haynes, ... 673
Lyon *v.* Lamb, ... 264
Lysaght *v.* Walkers, ... 269
Lyth *v.* Ault, ... 274

Mabon *v.* Christie, ... 792
Macao *v.* Officers of State, . . 27
Macey *v.* Metropolitan Board of Works, 502
Mack *v.* Clelland, ... 66, 853
MacAlister (Caledonian Dairy Co.) *v.* Alexander, 62, 73, 203, 334, 406, 412, 413.
MacAndrew *v.* Robertson, 20, 63, 73, 143, 350, 354
MacAra *v.* Wilson, . . . 26, 697
MacArthur *v.* Croall, ... 262
MacArthur *v.* M'Brair, . 144, 174, 790
MacAulay *v.* Gault, ... 633
MacAulay *v.* Renny, ... 22
MacBraire *v.* Hamilton, . 364, 551
MacBride *v.* Lindsay, ... 99
MacCall and Co. *v.* Black and Co., 368, 426
MacCallum *v.* Turton, ... 146
MacCallum and Co. *v.* M'Keand, . 374

PAGE
MacCaul v. Ramsay, . . . 427
MacClelland v. M'Cowan, 749, 750, 781
MacClelland v. Bank of Scotland, . 780
MacConnell v. Hector, . . . 27
MacCormick v. M'Cubbin, 430, 431, 666, 667
MacCowan v. Wright, . . . 178
MacCreath v. Borland, . . . 608
MacCubbin v. Turnbull, . . 785
MacCubbin v. Venning, . . 561
MacCulloch v. Wallace, . . 580
MacDonald v. Elder, . . . 634
MacDonald v. Macdonald, . . 403
MacDonald v. Walker, . . . 784
MacDonnell v. Caledonian Canal Commissioners, ... 564
MacDougal v. Maclaurin, . . 585
MacDowal and Gray v. Annan and Colquhoun's Assignees, . 759, 795
MacEwan v. Campbell, . . 78
MacEwen v. Woods, . . . 146
MacFarlane v. Black, . . . 597
MacFarlane v. Donaldson, . . 255
MacFarlane v. Downie, . . 627
MacFarlane v. Nicoll, . . . 759
MacGavin v. Ogilvie, . . 243, 771
MacGiven v. Blackburn, . . 50
MacGlashan v. Dundee and Perth Ra. Co., ... 262
MacGregor v. Bainbridge, 136, 378, 379
MacGregor v. MacGregor, . 282, 388
MacGregor v. Dreghorn, . . 783
MacIlreath v. Margetson, . 330, 415
MacIlwham v. Johnstone, . . 335
MacIndoe v. Frame, . . . 280
MacInlay and Co. v. MacInlay and Co., 348
MacIntosh v. Gibb, etc., . . 301
MacIntosh v. Taylor, . . . 776
MacIntyre v. Maxwell, . 369, 397, 398
MacIntyre v. Miller, . . . 266
MacIvor v. Humble, . . . 310
MacKeand v. Laird's Trs., . 407, 758
MacKeand v. Reid, . . 300, 301
MacKellar (Garden and Son's Sequestration), ... 783
MacKenzie (Lord Gray and Others), petr., ... 366
MacKenzie v. Clark, . . . 596
MacKenzie v. Inverness and Ross-shire Ra. Co., ... 451
MacKenzie v. Sligo and Shannon Ra. Co., 556
Mackenzie v. Smith, . . . 374
MacKessock v. Drew, . . . 596
MacKinlay v. Gillon, . 43, 48, 54, 66
MacKirdy v. Paterson, . . . 432
MacKnight v. Green, . . . 641
MacKintosh v. Robertson, . 528, 529
MacLae v. Sutherland, . . . 218
MacLaren v. Liddell, . . 668, 671
MacLaren v. Rae, . . 263, 363
PAGE
MacLaren v. Liddell's Trs., 347, 374, 396, 401
MacLaren v. Stainton, . . . 556
MacLean v. Muness, . . . 564
MacLean v. Rose, 242, 300, 302, 304, 540, 543, 627, 642
MacLean and Sons, petrs., . . 769
MacLeish v. M'Naught, . . 783
MacLeod v. Howden, . . 54, 359
MacLeod v. Langmuir, . . 553, 673
MacLeod v. Tosh, . 216, 230, 247, 366
MacLoughlan v. Evans, . . 563
MacManus v. Lancashire and York Ra. Co., ... 515
MacMillan v. M'Culloch, . . 544
MacMillan v. Walker, . . . 310
MacMorine v. Cowie, . . . 693
MacNab v. Lockhart and Hendrie, 280, 281, 282, 529, 531, 608
MacNab & Others v. Martin & Others, 188
MacNair v. Fleming, . . 234, 760
MacNair v. Henderson, . . . 372
MacNair and Co. v. Gray, etc., 199, 236, 243, 247
MacNaughton v. Allhusen and Co., 363
MacNaughton v. Caledonian Ra. Co., 264
MacNaughton v. Paterson, . 693, 694
MacNeill v. Blair, ... 280
MacNeill v. Coltness Iron Co., . 544
MacNeill v. Reid, ... 354
MacNiel v. MacMurchy and Co., . 641
MacOwen v. Hunter, . . . 414
MacTaggart's Reps. v. Robertson, 66
MacTavish v. Saltoun, . 550, 551, 558
MacVane v. MacVane, . . 171, 176
MacVicar v. Kerr, . . . 641
MacWhannell v. Dobbie, 430, 666, 667
MacWhirter v. Guthrie, 135, 182, 183, 378, 415, 668
Maddeford v. Austwick, . . 391
Madgwick v. Wimble, 585, 667, 674, 684
Madrid and Valentia Ra. Co., *in re*, 71, 708
Magdalena Steam Navigation Co., *in re*, 219
Maghie v. Tait, ... 428
Magistrates of Dumbarton, petr., . 462
Magistrates of Dunbar v. Kelly, . 440
Magistrates of Edinburgh v. Edinburgh, Leith, and Granton Ra. Co., . 580
Magistrates of Glasgow v. Miller, . 375
Magistrates of Hamilton v. Duke of Hamilton, ... 374
Magistrates of Inverness v. Skinners of Inverness, ... 440
Magistrates of Montrose v. Forsyth, 252
Maguire's case, . . 111, 721, 723
Mair v. Glennie, ... 54
Malachy v. Soper, . . . 346
Malcolm v. Cooks, . . . 633
Malcolm v. Northern Reversion Co., 646

PAGE
Malcolm *v.* West Lothian Ra. Co., 345, 408, 524
Malleable Iron Co. *v.* Buchanan, . 665
Manchester, Sheffield, etc. Ra. Co. *v.* Forrest, ... 205
Manchester, Sheffield, and Lincoln Ra. Co. *v.* Wallis, . . . 496
Mangles *v.* Grand Dock Co., . 164
Mann and Co. *v.* Skinner, . . 374
Manning *v.* East Counties Ra. Co., 496
Manser *v.* Northern and Eastern Counties Ra. Co., . . 489, 579, 580
Mansfield's case, ... 730
Mansfield *v.* Ross, ... 665
Mansfield *v.* Maxwell, ... 605
Mansfield, Earl of, *v.* Gray and Others, 179, 180
Mansfield, Earl of, *v.* Glasgow and Carlisle Ra. Co., ... 468
Manson *v.* Doull, ... 595
Mant *v.* Smith, ... 80
Mare *v.* Charles, ... 233
Marfel *v.* South Wales Ra. Co., . 496
Marks *ex parte*, ... 684
Marlborough Club Co. *in re*, . . lxviii
Marr *v.* Buchanan, ... 146
Marriott *v.* London and S.-W. Ra. Co., 517
Marshall *v.* Anderson, ... 586
Marshall *v.* Coleman, . . 386, 660
Marshall *v.* Marshall, 151, 430, 431, 657, 658, 666
Martin *v.* Hunter, ... 407
Martin *v.* Leicester Waterworks Co., 453
Mason *v.* Magistrates of Montrose, 99
Mason, etc. *v.* Magistrates of St Andrews, ... 188
Mason, etc. *v.* Rumsay 233
Mason's Lodge of Lanark *v.* Hamilton, etc., ... 537
Mathew's case, ... 70, 730
Mathew *ex parte*, ... 57
Mathieson *ex parte*, ... 561
Mathieson *v.* Fraser, . 199, 229, 307
Maxton *v.* Brown, 107, 109, 192, 204, 387
Maxton *v.* Muir, 335, 411, 587, 588, 674
Maxwell *ex parte*, ... 23
Maxwell *v.* Port Tenant Patent Steam Fuel Co., . . . 209, 352
May *v.* Mathews, . 345, 524, 525, 552
May *v.* Smith, ... 311
Mayhew's case, ... 145
Mayhew *v.* Eames, ... 536
Mayor of King's Lynn *v.* Pemberton, 581
Meek *v.* Ballandene, ... 643
Meiklejohn *v.* Masterton, . . 188
Meldrum *v.* Wilson, ... 696
Mellish *v.* Keen, ... 658
Melliss *v.* Royal Bank, . . 242, 797
Mercer *v.* Peddie, . . 300, 407
PAGE
Metcalf *v.* Rycroft, ... 201
Methven's Trs. *v.* Edinburgh, Perth, and Dundee Ra. Co., . . 464, 466
Meux's Executors' case, . . . 533
Meyer *v.* Sharp, ... 175
Michell *v.* Harris, ... 403
Micklethwaite *v.* Winter, . . 497
Midland Ra. Co. *v.* Daykin, . . 496
Midland Ra. Co. *v.* Gray, etc., 458, 462, 463
Midland Great Western Ra. Co. *v.* Gordon, . . . 70, 71, 72, 164
Midland Great Western Ra. Co. *v.* Leech (3 H. L. Cases 872), . 745
Milburne *v.* Codd, ... 81
Miles *ex parte*, ... 720
Miles *v.* Bough, 109, 111, 157, 160, 161
Miles *v.* Finlay and Co., . . 591
Mill *v.* Magistrates of Montrose, . 100
Mill and Co. *v.* Campbell and Hopkirk, 280
Millar *v.* Craig, ... 402
Millar *v.* Mitchell, 245, 246, 247, 249, 559
Millar *v.* Stewart, ... 641
Miller *v.* Brand, ... 759
Miller *v.* Douglas, 200, 229, 247, 249, 372
Miller *v.* Harvie, . . . 263, 363
Miller *v.* Lambert, ... 776
Miller *v.* Thorburn, . 187, 299, 758
Miller *v.* Ure, ... 559
Milliken *v.* Love, 273, 274, 282, 307
Milliken *v.* Milliken, . . . 685
Mills *v.* Albion Insurance Co., . 559
Mills *v.* Hamilton, . 526, 543, 682
Milne *v.* Bartlett, ... 659
Milne *v.* Magistrates of Edinburgh, 596, 672
Minnet *v.* Whitsey, ... 200
Minto *v.* Kirkpatrick, 138, 172, 174, 175, 178
Mitchell *v.* Hepburn, . . . 639
Mitchell *v.* Morrison, . . . 544
Mitchell *v.* Newhall, . . . 146
Mitchell *v.* Reynolds, . . . 676
Mitchell *v.* Smith, ... 362
Mixio *ex parte*, ... 725
Moir *v.* Alloa Coal Co., . 374, 375
Molton *v.* Camroux, ... 26
Monach's Creds. *v.* The Trustee, 212, 759
Moncrieff *v.* Edinburgh and Glasgow Ra. Co., ... 468
Moncrieffe *v.* Dunlop, . . . 363
Moncrieffe *v.* Perth Harbour Commissioners, . . 437, 438, 448
Monklands Ra. Co. *v.* Glasgow, Airdrie, and Monklands Ra. Co., 83, 437
Monmouthshire and Glamorgan Banking Co., *in re*, . . . 709
Monro *v.* Cowan and Co., . . 747
Monro *v.* Edinburgh Cemetery Co., 132, 133
Montgomerie *v.* Carrick and Napier, 364
Montgomerie *v.* Forrester and Co., 190, 658, 661, 665

PAGE
Moore *v.* Great Southern and Western Ra. Co., ... 501
Moore *v.* Rawlins, ... 154
Morans *v.* Armstrong, . . 200, 248
Morgan's case, . 152, 204, 217, 724
Morgan *v.* Marquis, . . . 316
Morgan *v.* Milman, . . . 672
Morgan *v.* Morris, . . . 617
Morison *v.* Boswell, . . . 252
Morisse *v.* Royal British Bank, . 324
Morrice *v.* Bell, ... 665
Morris *v.* Barrett, . . 173, 176
Morris *v.* Cannan, . . . 148
Morris *v.* Colman, . . . 573
Morris *v.* Harrison, . . . 402
Morris *v.* Kearsley, . . . 147
Morris and Co. *v.* Stewart and Co., 534, 682
Morrison *ex parte*, . . . 196
Morrison, petr., ... 583
Morrison *v.* Hunter, . . . 420
Morrison *v.* Miller, . . . 170
Morrison *v.* Mouat, . . . 573
Morrison *v.* Smith, . . . 354
Morrow *v.* Saunders, . . . 354
Mortimer *v.* Miller, . 146, 252, 865
Morton *v.* Black, ... 603
Morton *v.* Edinburgh and Glasgow Ra. Co., ... 262
Moss *v.* Steam Gondola Co., . 73, 144
Motteram *v.* Eastern Counties Ra. Co., 506
Mouchet *v.* Great Western Ra. Co., 448, 579
Mowat *v.* Tailors of Aberdeen, . 35
Mowatt *v.* Londesburgh, . . 82
Moyes *v.* Cook, . . . 365, 654
Moxley *v.* Alston, . . . 577
Muir *v.* Collett, ... 551
Muir *v.* Dickson, . . 273, 300, 308
Muirhead, petr 462
Muirhead *v.* Corri, . . . 639
Muirhead *v.* Stevenson, . . 639
Muirhead *v.* Town of Haddington, 283
Munro *v.* Cowan and Co., . 153, 154, 664, 672
Munt's case, . . . 152, 724
Munt *v.* Shrewsbury and Chester Ra. Co., ... 192, 578
Murray's Executors' case, . . 414
Murray *v.* Campbell and Co., . 232
Murray *v.* Hogarth and Co., 170, 683, 689
Murray *v.* Murray, . . 137, 178
Murray *v.* Ramsay and Co., . . 650
Murray *v.* Somerville, . . . 233

Nadin *ex parte*, ... 502
Nairne *v.* Sir William Forbes and Co., 30
Napier *v.* Glasgow and South-Western Ra. Co., ... lxviii
National Bank *v.* Hope, . . 533
National Credit and Exchange Co. (Limited), *in re* Companies Act, 1862, ... 569
National Exch. Co. *v.* Drew and Dick, 207, 257, 258, 260, 261, 304, 334, 335, 363, 532, 541, 548, 618, 861
National Exchange Co. *v.* Easton, . 143
National Exch. Co. *v.* Glasgow, Kilmarnock and Ardrossan Ra. Co., 107, 167, 190, 193, 387, 411, 576
National Exchange Co. *v.* Robertson, 860, 861
Natusch *v.* Irving, . 191, 193, 576
Naughton *v.* Ritchie, . . 229, 233
Naylor *v.* South Devon Ra. Co., . 576
Neale *v.* Turton, ... 234
Neil and Co. *v.* Campbell and Hopkirk, 531, 608
Neilson *ex parte*, ... 146
Neilson *v.* Rae, ... 630
Neilson *v.* Russell, . . . 797
Neilson *v.* Smiths, . . . 631
Nelson *v.* Bealby, . . . 137
Nerot *v.* Burnand, . . 25, 663
Ness *v.* Angas, ... 144
Ness *v.* Armstrong, . . . 144
New Brunswick and Canada Ra. Co. *v.* Muggeridge, 73, 74, 165, 353
New River Co. *v.* Johnson, . . 501
Newcastle Bank, *in re*, . . 328
Newcastle and Carlisle Ra. Co., Charlton *v.*, ... 192
Newmarsh *v.* Clay, . . . 268
Newry and Enniskillen Ra. Co. *v.* Coombe, ... 166
Newry and Enniskillen Ra. Co. *v.* Edmunds, ... 160
Newry and Enniskillen Ra. Co. (12 E. Jur. 10., 5 Ra. Cases 275), 163
Newry and Enniskillen Ra. Co. (3 Ex. 565), ... 165
Newry Ra. Co. *v.* Moss, . . 328
Newry, Warren Point, and Rostrevor Ra. Co. *v.* Graham, . . 167
Newsome *v.* Coles, . . . 58, 310
Newton *v.* Belcher, . . . 79
Newton *v.* Liddiard, . . . 79
Nicholls *v.* Diamond, . . . 233
Nicholls *v.* Dowding, . . . 65, 533
Nicholson *v.* Great-Western Ra. Co., 517
Nicholson *v.* Ricketts, . . . 202
Nicol's case, ... 725
Nicol *ex parte*, ... 152
Nicoll *v.* Christie, . . 668, 754, 784
Nisbet's Trs. *v.* Morrison's Trs., 280, 281, 531, 533
Nisbet *v.* Taylor's Exrs., . . 857
Nixon *v.* Brownlow, . . 72, 132, 323
Nixon *v.* Green, ... 323

PAGE
Noble *v.* Wood, ... 550
Nockels *v.* Crosby, . . . 82, 356
Norfolk, Duke of, *v.* Tennant, . 579
Norman *v.* Mitchell, . 72, 132, 575, 576
Norris *v.* Chambres, ... 559
Norris *v.* Cottle, ... 77
Norris *v.* Irish Land Co., . . 353
North American Colonial Association of Ireland *v.* Michell, . . 167
North American Colonial Association of Ireland *v.* Bentley, . . 160
North British Bank *v.* Allan, 548, 549
North British Bank *v.* Ayrshire Iron Co., ... 231, 372
North British Bank *v.* Collins, 132, 133, 347, 665, 671
North British Ra. Co. *v.* Barr, . 596
North British Ra. Co. *v.* Edinburgh and Glasgow Ra. Co., . . 580
North British Ra. Co. *v.* Hay, 479, 502
North British Ra. Co. *v.* Horne, . 643
North British Ra. Co. *v.* Tod, 437, 488
North of Scotland Banking Co. *v.* Duncan, ... 346
North of Scotland Banking Co. *v.* Thomson, . . . 334, 863
North Stafford Ra. Co. *v.* Dale, . 493
North Stafford Ra. Co. *v.* Landor, 449
North Stafford Ra. Co. *v.* Wood, . 449
North-Western Ra. Co. *v.* M'Michael, 24, 105, 165, 166
Northampton Bridge and Roads Co. *v.* London and Southampton Ra. Co., ... 493
Norton *v.* Seymour, . . . 65, 232
Norwich and Lowestoft Navigation Co. *v.* Theobald, . . 167, 311
Norwich Yarn Co., *in re*, . 110, 217
Nottidge *v.* Prichard, . . 529, 534

Oakes *v.* Oakes, . . . 142, 166
Oakley *v.* Pasheller, . . . 274
O'Byrne *v.* Burn, ... 264
Ogilvie *v.* Duff, ... 374
Oldaker *v.* Lavender, . . . 891
Oliver *v.* Grieve, ... 363
Oliver *v.* Hamilton, . . . 584
O'Mealy *v.* Wilson, . . . 28
Ord *v.* Barton, . . 174, 603, 790
Oriental Steam Navigation Co. *v.* Briggs, 353
Orr and Others *v.* Glasgow, Airdrie, and Monklands Ra. Co., 211, 336, 342, 575, 702
Orr and Barber *v.* Union Bank, . 262
Orr and Co. *v.* Pollock, . . 406
Orr and Harwood *v.* Hance, Son, and Weise, ... 759
Osborne *v.* Jullion, ... 61
Ostler *v.* Cooke, ... 458
Oswald's Trs. *v.* Dickson, 423, 427, 534
Owen *v.* Routh, ... 147
Owen *v.* Van Uster, . . . 233
Owen *v.* Wilkinson, . . . 424
Oxlade *v.* North-Eastern Ra. Co., . 516

Padon *v.* Bank of Scotland, . 309, 679
Paddon *v.* Richardson, . . . 692
Pagan *v.* Pagan, ... 142
Page *v.* Cox, ... 302
Painter's case, . . . 153, 154
Painter (3 Ad. and E. 433), . 161
Paisley Union Bank *v.* Hamilton, . 641
Palmer and Hungerford Market Co., *in re*, ... 502
Palmer *v.* Metropolitan Ra. Co., . 452
Palmer *v.* Mitchel, . . 669, 691
Parbury's case, ... 726
Parbury *ex parte*, ... 723
Pare *v.* Clegg, . . 17, 216, 217, 219
Park *v.* Wood's Trs., . . . 646
Parken *v.* Royal Exchange Co., . 558
Parker *v.* Bloxam, . . 402, 692
Parsons *v.* Hayward, . . . 658
Patent Artificial Stone Co., *in re*, . 709
Paterson *v.* Calder, . . 237, 360
Paterson *v.* M'Naughton, . 688, 694
Paterson *v.* Pollock, . . . 311
Paterson *v.* Sanderson, etc., . . 453
Pattison *v.* Allan and Co., . . 762
Paul *v.* Old Shipping Co., . . 256
Paul *v.* Robb, ... 795
Paul *v.* Taylor, . . 208, 386, 673, 677
Payne *v.* Bristol and Exeter Ra. Co., 488
Peacock *v.* Peacock, 136, 378, 584, 657, 658, 668
Pearson *v.* Skelton, . . 400, 414
Pearson, Wilson, and Co. *v.* Brock, 349, 792
Pearston *v.* Wilson and Maclean, 272, 300, 308
Pease *v.* Hewitt, ... 661
Peck *v.* North Staffordshire Ra. Co., 515
Peddie *v.* Brown and Co., . 479, 502
Peebles *v.* Turner, . . . 855
Peel *v.* Thomas, ... 62
Peele *ex parte*, . . 293, 296, 302
Pell's case, ... 730
Pemberton *v.* Oakes, . . 268, 269
Pender *v.* Henderson and Co., 331, 344
Penny *v.* South-Eastern Ra. Co., . 503
Penrose *v.* Martyn, . . 114, 115
Perens *v.* Johnson, . . . 664
Perrier *ex parte*, ... 210
Perring *v.* Hone, ... 62
Perth Harbour Commissioners *v.* Moncrieff, . . . 437, 438, 448
Petrie *v.* Hannay, ... 18

PAGE

Petrie's Exrs. *v.* Aitchison and Co., 370
Petre, Lord, *v.* Eastern Counties Ra. Co., ... 579
Pettigrew *v.* Wilson, ... 23
Pettyt *v.* Janeson, . . 667, 815
Phelps *v.* Lyle, ... 109
Philipson *v.* Earl of Egremont, . 100
Phillips *v.* Atkinson, . . 585, 674
Phillips *v.* Clagett, ... 536
Philips *ex parte*, ... 145
Philips *v.* Philips, . . . 178, 681
Philips *v.* Turner, ... 142
Phin *v.* Brisbane, ... 578
Phin *v.* Magistrates of Auchtermuchty, 787
Phœnix Life Assurance Co., *in re*, 110, 205, 218
Phœnix Life Assurance Co. (Hoare's case). See Hoare's case, . 328
Pickard *v.* Sears, ... 58
Pierse *v.* Bowles, ... 534
Pigott *v.* Bayley, ... 684
Pillans *v.* Harkness, . . 355, 654
Pim's case, ... 23
Pinchin *v.* London and Blackwall Ra. Co., ... 488
Pinder *v.* Wilks, ... 316
Piper *v.* Hammersmith and City Ra. Co., ... 471, 502
Pitchford *v.* Davis, ... 62
Pitmedden *v.* Patersons, . . 634
Pitt *v.* Cholmondeley, . . . 402
Playfair *v.* Bristol Ra. Co., . . 575
Pollock *v.* King, ... 795
Pollock *v.* Paterson, . . . 26, 659
Pollock *v.* Ritchie, ... 107
Pollock *v.* Stables, ... 145
Pollock, Gilmour, and Co. *v.* Ritchie, 399, 402
Pollock's Reps. *v.* Buchanan, 348, 382
Ponton *v.* Dunn, ... 142
Poole *v.* Masterman, ... 398
Poole *v.* Middleton, ... 142
Porteous *v.* Cordiners of Glasgow, 357
Porthouse *v.* Parker, ... 536
Portland, Duke of (Northern Yacht Club), *ex parte*, ... 537
Pott *v.* Eyton, ... 58
Poulson *ex parte*, ... 255
Powles *v.* Page, ... 315, 536
Poynder *v.* Great Northern Ra. Co., 490
Poynter *v.* Lorimer, ... 784
Prendergast *v.* Turton, ... 154
Presbytery of Ayr, petr., . . 462
Presbytery of Kirkcudbright *v.* Blair, 142
Preston *v.* Grand Collier Dock Co., 159, 575, 576
Preston *v.* Liverpool and Manchester Ra. Co., ... 84
Price and Brown's case, . . 721
Price *v.* Barker, ... 276

PAGE

Price *v.* Logan, ... 551
Price *v.* Wise, . . . 680, 692
Priestly *v.* Foulds, ... 494
Primrose *v.* Caledonian Ra. Co., 468, 588
Procurator-Fiscal *v.* Wool-combers of Aberdeen, ... 18
Prole *v.* Masterman, ... 80, 414
Proprietors of Boness Canal *v.* M'Alpine and Co., ... 250
Proudfoot *v.* Lindsay, 229, 230, 248, 249, 250
Pulling *v.* London, Chatham, and Dover Ra. Co., . . 471, 472
Pulsford *v.* Richards, . . 70, 653
Purves *v.* Home, ... 647

Raba *v.* Ryland, ... 220
Radcliffe *v.* Glasgow and Dumfries Ra. Co., ... 470
Rae *v.* Candlemakers of Edinburgh, 587
Rae *v.* Kay, ... 264
Rae *v.* Neilson, ... 630
Rait *v.* Primrose, ... 146
Raleigh *v.* Hughson and Dobson, 270, 422
Ralston, Goodwin, and Co. *v.* Maclean, 606
Ramsay *v.* Grierson, . . . 629
Ramsay *v.* Smaill, etc., 205, 364, 547
Ramsay's Exrs. *v.* Graham, . 308, 690
Ramsden *v.* Manchester South Junction Ra. Co., . . 471, 488, 502
Ramsgate Victoria Hotel Co. (Limited) *v.* Montefiore, . . . lxvi
Randall *v.* Randall, ... 178
Ranger *v.* Great Western Ra. Co., 259
Rankeillor *v.* Magistrates of St Andrews, 36
Ransome *v.* Eastern Counties Ra. Co., 516
Rapp *v.* Latham, ... 256
Rawlins *v.* Wickham, . . . 654
Rawlinson *v.* Clarke, ... 48
Rawson and Co. *v.* Johnstone, . 198
Raynal *ex parte*, ... 453
Raynard *v.* Chase, ... 19
Read *v.* Bowers, ... 573
Reade *v.* Bentley, ... 657
Reade *v.* Woodroofe, ... 401
Reavelcy's case, ... 23, 724
Redfearn *v.* Sommervail, . 327, 366
Reid's case, ... 724
Reid *ex parte*, ... 23
Reid *v.* Bartonshill Coal Co., . . 264
Reid *v.* Berry, ... 783
Reid *v.* Chalmers, ... 30, 757
Reid *v.* Douglas, . . . 525, 551
Reid *v.* Edinburgh Gas Light Co., 73
Reid *v.* Hollingshed, ... 175
Reid *v.* Kelso, ... 800
Reid *v.* Maxwell, ... 573
Reid *v.* Moir, ... 546

PAGE
Reid *v.* Steele, ... 252
Reid *v.* Watson, ... 427
Reid *v.* White, ... 272
Reid and Maccall *v.* Douglas, . 559
Renfrewshire Banking Co. *v.* M'Kellar, 590
Rennie *v.* Wynn, ... 79
Renton *v.* Scott's Trs., . . . 633
Reuter *v.* Electric Telegraph Co., . 208
R. *v.* Air and Calder Navigation, 498, 502, 503
R. *v.* Ambergate Ra. Co., . . 448
R. *v.* Birmingham and Gloucester Ra. Co., ... 489, 492
R. *v.* Birmingham and Oxford Ra. Co., 446
R. *v.* Bristol Dock Co., ... 494
R. *v.* Caledonian Ra. Co., . . 487
R. *v.* Cheltenham Commissioners, 460
R. *v.* Clear, ... 390
R. *v.* Committee of South Holland Drainage, ... 449, 460
R. *v.* Commissioners of Woods and Forests, ... 448
R. *v.* Cottle, ... 472, 487
R. *v.* Dodd, ... 287
R. *v.* Eastern Archipelago Co., . 99
R. *v.* Eastern Counties Ra. Co., 461, 492, 501
R. *v.* Fisher, ... 496
R. *v.* Frere, ... 506
R. *v.* General Cemetery Co., 106, 144
R. *v.* Grand Junction Ra. Co., . 507
R. *v.* Great Western Ra. Co., . 446
R. *v.* Grimshaw, ... 110
R. *v.* Haythorne, ... 98
R. *v.* Hodge, ... 755
R. *v.* Hughes, ... 98
R. *v.* Hungerford Market Co., . 447
R. *v.* Inhabitants of Ely, . . 494
R. *v.* Inhabitants of Kent, . . . 494
R. *v.* Inhabitants of Lindsey, . 494
R. *v.* Justices of West Riding of Yorkshire, ... 460
R. *v.* Kerrison, ... 494
R. *v.* Lancaster and Preston Ra. Co., 458, 459
R. *v.* Langhorn, ... 110
R. *v.* Leeds and Selby Ra. Co., 497, 498, 502
R. *v.* Liverpool and Manchester Ra. Co., 142, 502
R. *v.* London and Birmingham Ra. Co., 489, 492
R. *v.* London and North-Western Ra. Co., ... 458, 460, 461
R. *v.* London and South-Western Ra. Co., ... 472, 507
R. *v.* Macdonald, ... 48
R. *v.* Manchester Commissioners, . 447
R. *v.* Manchester and Leeds Ra. Co., 492
R. *v.* Metropolitan Board of Works, 501
R. *v.* Metropolitan Ra. Co., . . 458
R. *v.* Miller, ... 98
R. *v.* Mott, ... 135
R. *v.* North Midland Ra. Co., 498, 502
R. *v.* Norwich and Walton Trs., . 460
R. *v.* Rector of Lambeth, . . 117
R. *v.* Rigby, ... 492
R. *v.* Rock, ... 755
R. *v.* Sanderson, ... 755
R. *v.* Severn and Wye Ra. Co., . 507
R. *v.* Sharpe, ... 492
R. *v.* Sheffield and Manchester Ra. Co., 459
R. *v.* Southampton Ra. Co., . . 502
R. *v.* South Wales Ra. Co., . . 495
R. *v.* Thames and Isis Navigation Commissioners, ... 502
R. *v.* Wilts and Berks Canal Co., . 390
R. *v.* Wood, ... 506
R. *v.* York and North Midland Ra. Co., ... 448
Reynell *v.* Lewis, . 59, 62, 77, 80
Rhind *v.* Commercial Bank, . 262, 606
Rhodes *ex parte*, ... 721
Richards *v.* Scarborough Public Market Co., ... 488
Richardson *ex parte*, ... 326
Richardson, etc., *v.* Gavin, etc., . 414
Richmond, *in re*, ... 204
Richmond's case, 152, 153, 154, 725, 726
Richmond *v.* Grahame, . . . 546
Ricketts *v.* Bennet, . 199, 216, 410
Ricketts *v.* East and West India Docks and Ra. Co., ... 496
Rickman *v.* Parry and Maclachlan, 560
Ridgway *v.* Brock, . . 300, 757
Ridgway *v.* Phillips, ... 65
Ridley *v.* Plymouth Grinding Co., 109, 207, 238
Ridley *v.* Taylor, . . 200, 236, 249
Ridpath *v.* Forth Marine Insurance Co., ... 608, 795
Ripley *v.* Waterworth, . . . 178
Ritchie and M'Cormick *v.* Fraser, 556, 558
Ritchie *v.* Mackay, ... 531
Ritchie *v.* Scottish Central Ra. Co., 576
River Dun Navigation Co. *v.* North Midland Ra. Co., ... 579
Robb *v.* Forrest, . 242, 541, 771, 772
Roberts *v.* Earl of Rosebery, . . 252
Roberts *v.* Eberhardt, . . . 584, 660
Roberts *v.* Great Western Ra. Co., 496
Robertson *v.* Anderson, 537, 544, 624
Robertson *v.* Brown, ... 453
Robertson *v.* Gillespie, ... 245
Robertson *v.* Great Western Ra. Co., 579
Robertson *v.* Lockie, ... 660
Robertson *v.* Menzies, ... 365
Robertson *v.* Southgate, . . . 330

PAGE
Robertson *v.* Thom, . . 63, 73, 143
Robertson and Co. *v.* Galloway and Reid, ... 237
Robertson, Creditors of, . . 630
Robertson's Trs. *v.* Oughterson, . 794
Robinson's case, . . . 722, 726
Robinson *ex parte*, . . . 313
Robinson's Exrs., ... 414
Robinson *v.* Anderson, 136, 353, 378, 379
Robinson *v.* Bland, . . . 560
Robinson *v.* Gleadow, . . . 240
Robinson *v.* M'Cullochs, . 147, 252
Robinson *v.* Marchant, . . . 346
Robinson *v.* Stewart, . . . 783
Robinsons *v.* Middleton, . . 198
Robley *v.* Brooke, . . 173, 380
Robson *v.* Earl of Devon, . . 653
Rodgers *v.* Maw, ... 274
Rodgers *v.* Tailors of Edinburgh, . 37
Roger *v.* Jamieson, 316, 346, 526, 674
Rolfe and the Bank of Australia *v.* Flower and Co., . . . lxvi
Rooth *v.* Quin, . . . 248, 311
Rose *v.* Moore, 234, 237, 358, 526, 543
Ross *v.* East Lothian Ra. Co., 71, 142
Ross *v.* Lauder, ... 546
Ross *v.* Masson, ... 696
Ross *v.* Young and Others, . 233, 332
Rosse *v.* Wainman, . . . 497
Routh *v.* Peach, ... 402
Routh *v.* Thompson, . . . 240
Rowe *v.* Wood, . . 107, 387, 584
Rowlands *v.* Evans, . . . 659
Rowlandson *ex parte*, . . . 53
Rowley *v.* Adams, . . . 178
Rowley *v.* Horne, . . . 311
Roxburgh, Duke of, *v.* Swinton, . 583
Roxburgh Road Trs. *v.* North British Ra. Co., ... 436
Royal Bank of Scotland, . . 35
Royal Bank of Scotland *v.* Assignees of Stein, Smith, and Co., . . 798
Royal Bank of Scotland *v.* Christie, 673
Royal Bank of Scotland *v.* Fairholme, 138
Royal Bank of Scotland *v.* Greenock Bank, ... 199
Royal Bank of Scotland *v.* Scott, Smith, and Co., ... 560
Royal British Bank *v.* Turquand, 205, 207, 217
Royal Exchange *v.* Vaughan, . 98
Royds *v.* Fraser, ... 316
Russel *v.* Austwick, . . . 185
Russel *v.* Glen, ... 671
Russell *v.* Earl of Breadalbane, 368, 536, 791
Russell *v.* Kirk, ... 373
Russell *v.* M'Nab, . . 270, 422
Russell *v.* Roberts, . . . 212
Rustrick *v.* Derbyshire Ra. Co., 322, 323
Rutherford *v.* Finlayson and Finlayson, 345
Rutherford *v.* North British Ra. Co., 84
Rye *ex parte*, . . . 63, 70, 72

Sadd *v.* Maldon and Braintree Ra. Co., 448
Sadler *v.* Lee, . . . 26, 254, 659
St Patrick Assurance Co. *v.* Brebner, 559
St Thomas Hospital *v.* Charing Cross Ra. Co., ... 471
Salisbury, Marquis of, *v.* Great Northern Ra. Co., ... 446
Salmon *v.* Padon and Vannan, 270, 422
Salmon *v.* Todd's Trustees, . . 794
Salomons *v.* Laing, . . 192, 576
Samuel *v.* Edinburgh & Glasgow Ra. Co., 503
Samuel and Co. *v.* Brown, . 380, 400
Sandeman *v.* Scott, . . . 367
Sanders *v.* King, ... 401
Sanders *v.* Monro, . . . 783
Sanderson's case, ... 723
Sandilands *v.* Marsh, . . 199, 237
Sangster *v.* Burness, . . . 641
Saville *v.* Robertson, . . . 292
Savin *v.* Hoylake Ra. Co., . . lxvii
Sawers *v.* Balgarnie, . . . 795
Sawers *v.* Tradestown Victualling Society, ... 48, 66, 310
Saxon Life Assurance Society, 274, 742
Sayer *v.* Bennet, ... 659
Sayles *v.* Blane, . . . 148, 163
Sceales *v.* Wighton, . . . 798
Sclanders *v.* Kennedy, . . . 72, 342
Sclater *v.* Clyne, 524, 552, 663, 664, 665
Scot *v.* Ker, ... 773
Scotland *v.* Walkinshaw, 345, 524, 525
Scott *v.* Anderson, . . . 564
Scott *v.* Bird, ... 400
Scott *v.* Colburn, ... 218
Scott *v.* Edinburgh, Leith, and Granton Ra. Co., ... 493
Scott *v.* Fisher, ... 639
Scott *v.* Napier, . . . 544, 548
Scott *v.* North British Ra. Co., 448, 452
Scott *v.* Selbie, ... 252
Scott *v.* Stewart, ... 643
Scott and Hall *v.* Bissett, . 270, 422
Scottish Central Ra. Co. *v.* Wedderburn and Others, . . . 37
Scottish Emigration Society *v.* Borland and Others, . . . 345, 524
Scottish North-Eastern Ra. Co. *v.* Anderson, . . . 513, 866
Scottish North-Eastern Ra. Co. *v.* Stewart, ... 440
Scoullar *v.* Campbell and Co., . 641
Sea Insurance Co. *v.* Gavin, etc., 537, 540, 541, 546, 625
Sedgwick's case, . . . 409, 410

PAGE
Sedgwick *ex parte*, . . 414, 730
Seddon *v.* Connel, . . . 333
Selkrig *v.* Dunlop, 216, 229, 242, 642
Selwyn *v.* Harrison, . . 218, 413
Semple *v.* London and Birmingham Ra. Co., . . . 580, 581
Senior *v.* Metropolitan Ra. Co., . 503
Serrell *v.* Derbyshire Ra. Co., . 233
Shakle *v.* Baker, ... 431
Shand *v.* Henderson, . 441, 563, 571
Shand and Co. *v.* Winton, . . 799
Shanks *v.* Thomson, . . . 634
Sharp *v.* Milligan, . . . 215
Sharp, Fairlie, and Co. *v.* Garden, 638, 642
Shatly *v.* Robinson and Niven, . 636
Shaw *ex parte*, ... 463
Shaw *v.* Fisher, . . 147, 164, 353
Shaw *v.* Holland, ... 147
Sheffield's case, . . . 725, 726
Sheffield Gas Co. *v.* Harrison, 352, 353
Sheffield, Aston, and Manchester Ra. Co. *v.* Woodcock, 74, 105, 126, 143, 159
Sheppard *v.* Oxenford, . . 585, 674
Sherwood Loan Society, . . 708
Shiels *v.* Edinburgh & Glasgow Ra. Co., 363
Shirra *v.* King, ... 252
Shireff *v.* Wilkes, . . 200, 296, 297
Shortridge *v.* Bosanquet, . 144, 575
Shotton, Malcolm, and Co. *v.* M'Neil, 649
Shotts Iron Co. *v.* Hopkirk, 345, 524, 540, 552
Shrewsbury and Birmingham Ra. Co. *v.* London and N.-W. Ra. Co., 205, 439
Shropshire Union Ra. Co. *v.* Anderson, 165
Siffkin *v.* Walker, . . . 233
Sim *v.* Hodgert, ... 563
Sime *v.* Balfour, . 137, 175, 178, 751
Simmons *v.* Leonard, . . . 667
Simons *v.* Great Western Ra. Co., 515
Simpson *v.* Chapman, . . 670, 691
Simpson *v.* Dennison, 192, 439, 576, 578
Simpson *v.* Ingham, . . 268, 269
Simpson *v.* Lancaster and Carlisle Ra. Co., ... 448
Simpson *v.* Westminster Palace Hotel Co., ... 205, 576
Sims *v.* Brutton, ... 255
Sims *v.* Commercial Ra. Co., . 448
Sinclair *v.* Mossend Iron Co., . 364
Sinclair *v.* Staples, . 629, 630, 639
Skerratt *v.* North Staffordshire Ra. Co., 496
Skip *v.* Hardwood, . . . 428
Skirving *v.* Smellie, . . . 35
Slater *ex parte*, ... 277
Slater *v.* Henderson, . . . 255
Slipper *v.* Stidstone, . . . 271
Smith *v.* Barlas, ... 251
Smith *v.* Craven, . . . 219, 292
Smith *v.* Everett, ... 431
PAGE
Smith *v.* Falconer, . . 283, 532
Smith *v.* Goldsworthy, 109, 135, 159, 193
Smith *v.* Hull Glass Co., . . 208
Smith *v.* Jamieson, . . 199, 255
Smith *v.* Jarvis, ... 229
Smith *v.* Jeyes, . . 573, 660, 815
Smith *v.* Johnson, . . 116, 234
Smith *v.* Jones, ... 798
Smith *v.* Logan, . . . 533, 603
Smith *v.* Mawhood, . . . 19
Smith *v.* Mules, ... 153
Smith *v.* North British Ra. Co., . 679
Smith *v.* Parkes, . . . 141, 663
Smith *v.* Pullar, . 65, 66, 533, 602, 795
Smith *v.* Smith, . . . 173, 174
Smith *v.* Stokes, ... 316
Smith *v.* Watson, . . . 175
Smith *v.* Wigley, ... 268
Smith *v.* Winter, ... 317
Society of Practical Knowledge *v.* Abbott, ... 204, 209
Solly *v.* Forbes, ... 276
Solomon *v.* Medex, . . . 346
Somervail *v.* Edinburgh Bible Society, 546
Somervails *v.* Redfearn, . . 790
Somerville *v.* Mackay, . . . 401
Somerville *v.* Rowbotham, . . 553
Somes *v.* Currie, . . . 98, 136, 383
Sorley's Trustees *v.* Graham, 214, 246
Southampton Dock Co. *v.* Richards, 105, 159, 160
Southampton Steamboat Co. (Limited), Hopkin's case, . . . 715
South Carolina Bank *v.* Case, 200, 202, 234, 555
South-Eastern Ra. Co. *v.* Hebblewhite, 157
South-Eastern Ra. Co. *v.* European and American Electric Telegraph Co. *ex parte*, ... 518, 674
South Essex Gas Light and Coke Co., *in re* (31 L. G. C. H. 293, 2 J. & H. 306), ... 219
South Metropolitan Gas Co. *v.* Marquis of Lothian, ... 363
South Stafford Ra. Co. *v.* Burnside, 722
South Stafford Ra. Co. *v.* Hall, 501, 502
South Wales Ra. Co. *ex parte*, . 470
South Wales Ra. Co. *v.* Redmond, 205
South Wales Ra. Co. *v.* Richards, 459, 460, 496
Southern Bank of Scotland, petrs., 587, 674
Snodgrass *v.* Hair, 317, 372, 673, 678, 770, 780
Spackman's case, ... 725
Spackman *v.* Lattimore, . . 73, 85
Sparrow *v.* Oxford and Wolverhampton Ra. Co., ... 502
Sparrow *v.* Oxford and Worcester Ra. Co., . . . 446, 447, 471

	PAGE
Spears *v.* Attorney-General,	755
Speirs *v.* Ardrossan Canal Co.,	457, 564
Speirs *v.* Dunlop and Co.,	781
Speirs *v.* Royal Bank,	311, 359
Spence *v.* Auchie,	792
Spence and Others *v.* Paterson,	26
Spence's case,	722
Spence *v.* Eadie,	783
Spencely *v.* Greenwood,	274
Spencer *v.* Spencer,	402
Spicer *v.* James,	430
Spottiswood *v.* Morrison,	557
Stables *v.* Ely,	309, 318
Stainton *v.* Carron Co.,	402, 410
Stainbank *v.* Fernley,	333, 654
Stalker *v.* Aiton,	631
Stalker *v.* Carmichael,	675
Stalsmidt *v.* Lett,	330
Stamps *v.* Birmingham Ra. Co.,	448
Standish *v.* Mayor of Liverpool,	579
Stanhope's case,	152, 724
Stapley *v.* London, Brighton, and South Coast Ra. Co.,	lxvii
State Fire Insurance Co.,	726
Stead *v.* Salt,	528, 529
Steadman *v.* Arden,	82, 356
Steel and Co., petrs.,	797
Steel and Co. *v.* Hoome and Co.,	198
Steele *v.* Midland Ra. Co.,	lxvii
Steigenberger *v.* Carr,	62
Stein *v.* Calder,	229
Stein's Assignees *v.* M'Clumpha's Trs.,	792
Stephen *v.* Myles,	782, 786
Stephen *v.* Reynolds,	202
Stephenson and Co. *v.* Caledonian Ra. Co.,	576
Stevens *v.* Cook,	344
Stevens *ex parte*,	470
Stevens *v.* Guppy,	147
Stevens *v.* South Devon Ra. Co.,	190, 381, 382, 383, 577
Stevenson *v.* Arran Fishing Co.,	537
Stevenson *v.* Campbell,	246
Stevenson *v.* Duncan,	409
Stevenson *v.* Paul,	639
Stevenson *v.* Wright,	43
Stevenson and Co. *v.* Macnair,	20, 286
Stewart *v.* Anglo-Caledonian Gold Mining Co.,	106
Stewart *v.* Auld,	782
Stewart *v.* Bell,	364
Stewart *v.* Blackburn,	577
Stewart *v.* Cauty,	146, 147
Stewart *v.* Countess of Moray,	364
Stewart *v.* Forbes,	136, 378, 379
Stewart *v.* Gibson,	17
Stewart *v.* Gloag,	336
Stewart *v.* Lang's Trs.,	403
Stewart *v.* Midland Junction Ra. Co.,	568
Stewart *v.* Scottish Midland Ra. Co.,	557
Stewart *v.* Scottish North-Eastern Ra. Co.,	436, 440
Stewart *v.* Simpson,	666, 667
Stewart *v.* Stewart,	280, 531
Stewart and Co. *v.* Telfer and Co.,	608
Stikeman *v.* Dawson,	23, 165
Stirling *v.* Edinburgh and Glasgow Ra. Co.,	464
Stirling and Dunfermline Ra. Co. *v.* Edinburgh and Glasgow Ra. Co.,	365
Stirling and Sons *v.* Duncan and Co..,	426
Stirling and Sons *v.* Stirling and Robertson,	791
Stirling and Robertson *v.* Stirling and Sons,	639
Stocken *v.* Dawson,	183, 688
Stocker *v.* Brocklebank,	48
Stocker *v.* Collin,	569
Stocker *v.* Wedderburn,	352
Stokes *v.* Lewis,	410
Stone *v.* Commercial Ra. Co.,	447, 454, 579
Stone *v.* Marsh,	254
Storer *v.* Great Western Ra. Co.,	495
Stourbridge Canal Co. *v.* Dudley,	499
Stoveld *v.* Eade,	269
Strachan *v.* Douglas,	630
Strachan *v.* Paton,	252
Strangford *v.* Green,	529
Stratford and Moreton Ra. Co. *v.* Stratton,	159, 161
Strathmore, Earl of, *v.* Strathmore Trs.,	462
Stray *v.* Russel,	146, 147
Street *v.* Rigby,	403
Straffon's Executors' case, *in re*,	721, 722, 723
Stroud, *in re*,	461
Struthers (Barr *v.* M'Ilwham and Speirs, see Struthers *v.* Barr),	668
Struthers *v.* Barr,	135, 377, 378 379, 380
Stuart, petr.,	783
Stuart *v.* Bute,	388, 389
Stuart, Lord James, petr.,	462
Stuart and Fletcher *v.* M'Gregor and Co.,	368, 426
Stubbs *v.* Lister,	381
Stubley *v.* London and North-Western Ra. Co.,	lxvii
Stupart *v.* Arrowsmith,	401
Sturge *v.* Eastern Counties Ra. Co.,	382, 577
Sturrock *v.* Thoms,	132, 414, 547, 624
Sudlow *v.* Dutch Renish Ra. Co.,	556
Sumner *v.* Powell,	690
Sutherland *v.* Gunn,	372, 642
Sutton *v.* South-Eastern Ra. Co.,	lxvii
Sutton *v.* Tatham,	145

PAGE
Swan *v.* Bank of Scotland, . . 361
Swan *ex parte*, ... 148
Swan *v.* North British Australian Co., 148
Swan *v.* Steele, ... 200, 234
Swan's Trs. *v.* Muirkirk Iron Co., 364
Swansea Dock Co. *v.* Levien, 109, 124, 158, 167
Swinburne *v.* Western Bank of Scotland, ... 231
Sword *v.* Cameron, . . . 264
Syme *v.* Anderson, . . . 635

Taft *v.* Harrison, ... 142
Talbot's case, ... 288
Tallis *v.* Tallis, ... 676
Tanner *v.* Tanner, . . . 166
Tannoch *v.* Reid, ... 537
Tawney *v.* Lynn and Ely Ra. Co., 448
Tay Ferry Trusts *v.* Stewart and Merchant, ... 563
Taylor, *in re*, ... 449
Taylor *ex parte*, ... 24
Taylor *v.* Clemson, . . 458, 488
Taylor *v.* Davis, ... 388
Taylor *v.* Drummond, . . . 774
Taylor *v.* Farrie, ... 761
Taylor *v.* Great Indian Ra. Co., . 148
Taylor *v.* Hughes, . . . 575
Taylor *v.* Hunter and Others, . 798
Taylor *v.* Jones and Latouche, . 166
Taylor *v.* Kymer, . . . 269
Taylor *v.* Rundell, . . 388, 389
Taylor *v.* Shaw, ... 402
Taylor *v.* Taylor, ... 760
Taylor and Sons *v.* Taylor, . 375, 573
Telford *v.* James' Executors, 231, 232, 233
Tempest *v.* Kilner, . . 145, 147
Tennent *v.* M'Donald, . . 596, 760
Tennant *v.* Strachan, . . . 234
Tennent *v.* Turner, . . 441, 564
Terrell's case, ... 714
Teversham *v.* Cameron's Coalbrook Co., ... 414
Thames Haven Dock Co. *v.* Rose, 109, 158, 207
Thicknesse *v.* Bromilow, . . 229
Thickness *v.* Lancaster Canal Co., 712
Thom *v.* North British Bank, 316, 420, 544, 548, 549, 606, 607, 624, 673
Thom *v.* Stewart, . . . 641
Thomas' case, ... 722
Thomas *v.* Clarke, . . 239, 303
Thomas *v.* Shillibeer, . . 273, 308
Thomason *v.* Frere, . . . 313
Thompson *v.* Wesleyan Newspaper Association, ... 231
Thompson *v.* Brown, . . 266, 269
Thompson *v.* Charnock, . . 403

PAGE
Thompson *v.* Percival, . 272, 274, 308
Thomson's case, ... 725
Thomson *v.* Bank of Scotland, . 361
Thomson *v.* Campbell's Trs., . 43, 343
Thomson *v.* Duncan, . . . 776
Thomson *v.* Fullarton, 63, 73, 105, 143
Thomson *v.* Gavin, . . . 639
Thomson *v.* Gilkison, . . . 553
Thomson *v.* Johnstone, . 542, 641
Thomson *v.* Liddell and Co., 232, 541, 558, 627, 642
Thomson *v.* Lyell, etc., . 688, 694
Thomson *v.* M'Kailie, . . . 17
Thomson *v.* Monklands Ra. Co., . 604
Thomson *v.* Shanks, . . . 46
Thomson *v.* Speirs, . . . 310
Thomson *v.* Stevenson, 270, 271, 422, 587, 674, 752
Thomson *v.* Universal Salvage Co., 231
Thomson and Co. *v.* Sharp, . . 372
Thomsons and Co. *v.* Craig and Hunter, 371
Thorburn *v.* Ellis, . . . 263
Thornton *v.* Howe, . . . 17
Thornton *v.* Proctor, . . . 410
Thriepland *v.* Creditors of York Buildings Co., ... 762
Tilson *v.* Warwick Gas Co., . . 81
Tink *v.* Rundle, ... 449
Tisken *v.* City Gas Co. of Glasgow, 503
Titchfield, Marquis of, *v.* Glasgow and South-Western Ra. Co., . 467
Tittenson *v.* Peat, . . . 402
Todd *v.* Clyde Trs., . 438, 578, 579
Tomlin *v.* Lawrence, . . . 534
Tooke *ex parte*, . . . 159, 160
Torphichen, Lord, *v.* Caledonian Ra. Co., 467
Tothill's case, ... lxvi
Toulmin *v.* Copland, . . . 388
Towne *v.* London and Limerick Steamship Co., ... 569
Townend *v.* Townend, . . 669, 691
Traquair, Earl of, *v.* Burrows, . 282
Travis *v.* Milne, ... 692
Treacher *v.* Galloway, . . . 282
Tredwin *v.* Bourne, . . . 62
Trinity House *v.* Magistrates of Edinburgh, ... 554
Trotter *v.* Dores, ... 544
Troughton *v.* Hunter, . 309, 573, 575
Troup's case, . . . 217, 412
Trustees of the Harbour of Helensburgh *v.* Caledonian and Dumbarton Ra. Co., ... 84
Tulk, Ley, and Co. *v.* Anderson, . 362
Tullis *v.* White, ... 641
Tulloch *v.* Davidson, 331, 334, 335, 336, 859, 863
Tulloch *v.* Pollock, . . . 800
Tunley *v.* Evans, ... 533

PAGE

Tuohey *v.* Great Southern and Western Ra. Co., ... 501
Tupper and Carr *v.* Rowell and Co., 199, 247, 864
Turnbull *v.* Allan and Sons, 63, 73, 143, 144
Turnbull *v.* Mackie, 199, 216, 229, 232, 249
Turnbull *v.* Scottish Central Ra. Co., 448
Turnbull *v.* Smellie, ... 784
Turner *ex parte*, ... 729
Turner *v.* Maclaren, ... 428
Turner *v.* Mollison, . 62, 73, 132, 408
Turner *v.* Sheffield and Rotherham Ra. Co., ... 503
Turquand *ex parte*, . . 61, 355
Turquand *v.* Vanderplank, . . 313
Tweedie *v.* Beattie, . . . 644
Tyerman *v.* Smith, ... 452

Union Bank of Calcutta, *in re*, . 708
United States Bank *v.* Burney, . 202
University of Glasgow *v.* Physicians and Surgeons, . . . 33, 35, 36
Urie *v.* Lumsden, ... 729
Usher *v.* Dauncey, ... 317

Vance *v.* East Lancashire Ra. Co., 192, 578
Vane *v.* Cobbold, ... 82
Van Sandau *v.* Moore, . . 658, 665
Venables *v.* Wood, . 51, 65, 66, 293
Vere *v.* Ashby, ... 296
Vernon *v.* Vawdry, ... 402
Vice *v.* Anson, . . . 58, 62, 65
Vice *v.* Fleming, . . 200, 230
Vollans *v.* Fletcher, . . 82, 356
Vulliamy *v.* Noble, 59, 254, 311, 683, 691

Waddell *v.* Gibson, ... 24
Waddell *v.* Maclaren, . . . 372
Wainwright *v.* Ramsden, . . 502
Wainwright *v.* Waterman, . . 684
Walburn *v.* Ingilby, . . . 20
Waldie *v.* Duke of Roxburgh, 263, 363
Walker's case, ... 152
Walker *v.* Bartlett, . . . 147
Walker *v.* Caledonian Ra. Co., . 251
Walker *v.* Consett, ... 402
Walker *v.* Davidson, . 307, 360, 680
Walker *v.* Harris, . . 354, 355
Walker *v.* Hunter, . . . 646
Walker *v.* Irvin and Co., . . 641
Walker and Johnston *v.* Sir W. Forbes and Co., ... 643
Walkinshaw *v.* Adams, . . . 376
Wallace *v.* Kelsall, . . 529, 534
Wallace *v.* Magistrates of St Andrews, 357

PAGE

Wallace *v.* Plock and Logan, 627, 642
Wallace and Co. *v.* Campbell, 173, 249, 330
Wallace, Hamilton, and Co. *v.* Campbell, 639
Walmsley *v.* Walmsley, . . 391
Walstab *v.* Spottiswoode, . 82, 356
Walter's case, . . . 721, 723
Walton *ex parte*, ... 723
Walworth *v.* Holt, ... 398
Wansbeck Ra. Co. *v.* Townsend, . lxviii
Ward *v.* Londesborough, . . 356
Ward *v.* Matheson, . . . 63, 73
Warden of Dover *v.* South-Eastern Ra. Co., ... 488
Wardrop *v.* Fairholm, . . . 630
Ware *v.* Grand Junction Water Co., 578
Ware *v.* Regent's Canal Co., . 502, 503
Warner *v.* Cunningham, 59, 141, 352, 683
Warren *v.* Reid, ... 661
Waterford and Dublin Ra. Co. *v.* Dalbiac, ... 167
Waterford and Dublin Ra. Co. *v.* Pidcock, ... 105
Waterford and Dublin Ra. Co. *v.* Logan, 672
Waterford and Limerick Ra. Co. *v.* Kearney, ... 493
Waters *v.* Taylor, 26, 577, 584, 659, 660, 667
Watney *v.* Wells, ... 661
Watson *ex parte*, . . . 24, 57, 58
Watson *v.* Ayrshire Iron Co., 407, 668
Watson *v.* Charlemont, . 79, 82, 350
Watson *v.* Eales, . 153, 154, 167, 576
Watson *v.* Kidston, . . . 252
Watson *v.* Neuffert, . . . 675
Watson *v.* Smith, ... 59, 654
Watson *v.* Smith and Co., . . 783
Watson *v.* Spratley, . . . 145
Watson and Co. *v.* O'Reilly and Co., 374
Watt *v.* Doig, ... 748
Watt *v.* Mitchell, . . . 147, 252
Watts *v.* Brooks, ... 18
Wauchope, petr., . . . 462, 464
Wauchope *v.* York Buildings Co., . 374
Waugh *v.* Carver, . 53, 54, 56, 57, 58
Way *v.* Kay, etc., . . 544, 549
Weatherly *v.* Turnbull, 63, 73, 143, 354
Webb, *in re*, . . . 330, 415
Webb *v.* Manchester and Leeds Ra. Co., ... 448, 490
Webster *v.* Bray, . 136, 183, 353, 379
Webster *v.* Webster, 59, 318, 431, 682, 691
Wedderburn *v.* Scottish Central Ra. Co., . 107, 190, 387, 439, 576, 578
Wedderburn *v.* Wedderburn, 175, 402, 430, 431, 670, 688
Weir *v.* Falconer, ... 637
Weld *v.* South-Western Ra. Co., . 446
Welland Ra. Co. *v.* Blake, . . 556
Wells *v.* Masterman, . . . 249
Wells *v.* Williams, . . . 27

PAGE

Wemyss *v.* Australian Co. of Edinburgh, ... 559, 864
West *v.* Skip, ... 428
West Cornwall Ra. Co. *v.* Mowatt, 218
West Cornwall Ra. Co., Casandra Wilby *v.*, ... 205
West London Ra. Co. *v.* Bernard, . 160
West of Scotland Malleable Iron Co. *v.* Buchanan, . . . 316, 605, 673
Western Bank *v.* Ayrshire Bank, . 305
Western Bank *v.* Bairds, . 107, 334, 336
Western Bank *v.* Douglas, . . 336
Weston *v.* Corporation of Tailors, . 264
Westropp *v.* Solomon, . . . 146
Wharton *v.* May, ... 402
Wheal Emily Mining Co., *in re*, . 724
Wheeler *v.* Van Wart, . 656, 657, 658
Wheldon *v.* Matthews, . . . 311
White *v.* M'Intyre, . . 292, 293
White *v.* Spottiswoode, . . 637
White *v.* Steele, ... 117
Whitehaven and Furness Ra. Co. *v.* Bain, ... 104, 160, 604
Whitehaven and Furness Ra. Co. *v.* Macfadyen, . . 36, 554, 606, 860
Whitehead *v.* Barron, . . . 79
Whitehead *v.* Hughes, . . . 525
Whitehead *v.* Thompson, . . 561
Whitehead *v.* Tuckett, . . . 198
Whitmore *ex parte*, . . 296, 302
Whittaker *v.* Howe, . . . 573
Whitle *v.* Macfarlane, . . . 182
Whitwell *v.* Perrin, . . . 246
Whytlaw *v.* Coats, . . 380, 666
Wickham *v.* Wickham, . . 269
Wightman *v.* Townroe, . 327, 691, 692
Wightman *v.* Watson, . . . 53
Wild *v.* Milne, ... 666
Wilkie *v.* Dunlop, . . . 24
Wilkie *v.* Johnstone, . . . 66
Wilkie *v.* Michie, ... 146
Wilkinson *v.* Fraser, . . . 54
Wilkinson *v.* Lloyd, . . . 147
Willett *v.* Blanford, . . 669, 670
Willett *v.* Chambers, . . 249, 254
Willey *v.* Parrott, . . . 82
Williams' case, ... 742
Williams *ex parte*, . 296, 302, 664
Williams *v.* Bingley, . . . 573
Williams *v.* Great Western Ra. Co., 506
Williams *v.* Keats, . . 58, 310, 318
Williams *v.* Page, ... 208
Williams *v.* Prince of Wales Life Co., 389
Williams *v.* Rowlands, . . . 659
Williams *v.* St George's Harbour Co., 85
Williams *v.* Williams, . . . 676
Williamson *v.* Johnson, . . 234
Williamson *v.* North British Ra. Co., 107, 190, 387, 575

PAGE

Williamson *v.* White, ... 264
Willis *v.* Dyson, . . . 230, 248
Willis *v.* Jernegan, . . . 402
Willison *v.* Pattison, . . . 28
Wills *v.* Murray, ... 110
Wilson *ex parte*, ... 246
Wilson, ... 387
Wilson *v.* Alexander, . . . 793
Wilson *v.* Beveridge, . . . 607
Wilson *v.* Bruce, . 152, 304, 406, 407
Wilson *v.* Brunton, . . . 561
Wilson *v.* Caledonian Ra. Co., 108, 581
Wilson *v.* Clyde Trustees, . . 438
Wilson *v.* Curson, . . . 81
Wilson *v.* Ewing and Co., . 623, 641
Wilson *v.* Glasgow and South-Western Ra. Co., 107, 193, 375, 387, 576, 604, 606.
Wilson *v.* Greenwood, 387, 584, 587, 667, 672, 675
Wilson *v.* Jobson, ... 537
Wilson *v.* Keating, . . 147, 353
Wilson *v.* Kippen, 543, 545, 552, 624
Wilson *v.* Laidlaw, . . 366, 653
Wilson *v.* M'Dougall, . . . 47
Wilson *v.* Mires, ... 213
Wilson *v.* Moore, ... 692
Wilson *v.* Threshie, . . . 176
Wilson *v.* Walker, . . . 145
Wilson *v.* Whitehead, . . 213, 292
Wilson *v.* Wilson, . . . 109
Wilson and Co. *v.* Cunningham and Co., ... 639
Wilson and Co. *v.* Ewing, . . 542
Wilson and Corse *v.* Gardiner, . 274
Winch *v.* Birkenhead Ra. Co., 192, 439, 576
Wise *ex parte*, ... 709
Wishaw Ra. Co. *v.* Caledonian Ra. Co., 588
Wishaw and Coltness Ra. Co. *v.* Dixon, 497
Wishaw & Coltness Ra. Co. *v.* Stewart's Representatives, . . . 366
Wixon *v.* Deans, ... 232
Wixon *v.* Nicoll, . . . 232, 773
Wood *v.* Argyll, ... 62
Wood *v.* Braddick, . . . 533
Wood's Claim (9 W. R. 366, and 10 W. R. 662), . . 213, 219, 742
Wood *ex parte*, ... 218
Wood *v.* M'Caul, ... 546
Wood *v.* North Stafford Ra. Co., . 492
Wood *v.* Stourbridge Ra. Co., . 501
Wood, James, and Wood *v.* Downie, 422
Woodside *v.* Cuthbertson, . . 246
Woollaston's case, . . . 725
Woolmer *ex parte*, . . . 730
Woolmer *v.* Toby, . . . 355
Worcester Corn Exchange Co., *in re*, 216 219, 288, 413, 536
Wordie *v.* M'Donald, . . . 566

PAGE

Worsley *v.* South Devon Ra. Co., . 446
Worth's case, ... 260
Worth *ex parte*, ... 726
Wotherspoon *v.* Magistrates of Linlithgow, ... 747, 749
Wight *v.* Wight, ... 639
Wrexham *v.* Huddlestone, . 26, 659
Wright *v.* Arthur, ... 66
Wright *v.* Gardner's Trs., 152, 310, 407, 689
Wright *v.* Snowe, ... 24
Wright *v.* Winter, ... 795
Wrightson *v.* Pullar, ... 317
Wryghte *ex parte*, ... 714
Wryghte *v.* Lindsay, ... 772
Wylam's Steam Fuel Co. *v.* Street, 722
Wyld *ex parte*, ... 709
Wyld *v.* Hopkins, . . 59, 62, 77, 80
Wynne *v.* Price, . 147, 148, 164, 353

PAGE

Yetts *v.* Norfolk Ra. Co., . . 577
Young *v.* Brown and Co., . . 362
Young *v.* Collins, . 316, 317, 674
Young *v.* Hunter, ... 296
Young *v.* Livingston, 543, 557, 566, 567
Young *v.* Milne, ... 564
Young *v.* Smart, ... 246
Young, Ross, and Richardson *v.* Muir, 756, 792
Young's Trs. *v.* Scott, . . . 373
Younger *v.* Caledonian Ra. Co., . 453
York and North Midland Ra. Co. *v.* Hudson, 193, 209, 210, 384, 411, 415.
York Buildings Co. *v.* Robertson, . 357
York Buildings Co. *v.* Ferguson, . 214
York Buildings Co. *v.* Mathie, . 590

LIST OF AUTHORITIES

WITH THE USUAL ABBREVIATIONS.

Abbot Mer. Ship.	Abbot on Merchant Shipping.
Abr. Ca. Eq.	Abridgment of Cases in Equity.
Ad. Con.	Addison on Contracts.
Ad. Torts	Addison on Torts.
Ad. and E.	Adolphus and Ellis's Reports. The New Series is cited as Q. B.
Alex. Bank.	Alexander's Digest of the Bankrupt Act.
Amb.	Ambler's Reports, Chancery.
And.	Anderson's Reports, C. P.
Andr.	Andrew's Reports, K. B.
Annaly	Annaly's Reports, K. B.
Anst.	Anstruther's Reports, Exch.
Archb. Ar.	Archbold's Law of Arbitration.
Arch. B. L.	Archbold's Bankrupt Law.
Archb. Part.	Archbold's Law of Partnership.
Arm. M. and O.	Armstrong, Macartney, and Ogle's Reports, N. P. Ireland.
Atk.	Atkin's Reports, Chancery.
B. and A. or Barn. and Ald.	Barnewall and Alderson's Reports, K. B.
B. and Ad. or Barn. and Adol.	Barnewall and Adolphus's Reports, K. B.
B. and C. or Barn. and Cress.	Barnewall and Cresswell's Reports, K. B.
B. C. C.	Bail Court Cases, Lowndes and Maxwell.
B. C. R.	Bail Court Reports, Saunders and Cole.
Bac. Abr.	Bacon's Abridgment.
Baily B.	Baily on Bills.
Bank. I.	Bankton's Institutes.
Barn. C.	Barnardiston's Reports, Chancery.
Barn. K. B.	Barnardiston's Reports, K. B.
Basilicor. Tom.	Basilicorum, Toma.
Batten	Batten's Law of Contracts.
Batt.	Batty's Reports, K. B. Ireland.
Beat.	Beatty's Chancery Reports, Ireland.
Beav.	Beavan's Reports, Rolls Court.
Beaw.	Beawe's Lex Mercatoria.
Bel.	Bellewe's Reports, K. B.
Bell App.	Bell's Appeal Cases.
Bell. Arb.	Bell on Arbitration.
Bell. C.	Bell's Cases.
Bell Com.	Bell's Commentaries.
Bell. D.	Bell's System of Deeds.
Bell. Dict.	Bell's Dictionary.
Bell Illust.	Bell's Illustrations.
Bell. L.	Bell on Leases.
Bell. Prin.	Bell's Principles.
Benal. or Benl.	Benloe's Reports, K. B.
Benl. and Dal.	Benloe and Dalisen's Reports, C. P.
Bennet	Bennet's Receiver.
Bev. Pro.	Beveridge's Forms of Process.
Bing.	Bingham's Reports.

Bing. N. C.	Bingham's New Cases.
Bisset	Bisset on Partnership and Joint-stock Companies.
Bl. D. and Osb.	Blackham, Dundas, and Osborne's Reports, N. P. Ireland.
Bl. R.	Mr Justice Blackstone's Reports.
Black. W.	Sir William Blackstone's Reports.
Black. H.	Henry Blackstone's Reports.
Blacks. Com.	Blackstone's Commentaries.
Bli. or Bligh	Bligh's Reports in House of Lords.
Bligh N. S.	Bligh's Reports, New Series.
Br.	Alexander Bruce's Reports.
B. N. C.	Brook's New Cases, K. B.
B. and P. or Bos. and Pul.	Bosanquet and Puller's Reports, C. P.
Bos. and P. N. R.	Bosanquet and Puller's New Reports, C. P.
Br. N. C.	Brooke's New Cases, K. B.
Bridg.	Bridgman's Reports, C. P.
Bridg. O.	Orlando Bridgman's Reports, C. P.
Bro. Stair,	Brodie's Stair.
Broom Com.	Broom's Commentaries.
Bro. S.	Brown on Sale.
Brown Traf.	Brown on the Railway and Canal Traffic Act.
Bro. Supp.	Brown's Supplement.
Bro. Syn.	Brown's Synopsis.
Brownl.	Brownlow and Gouldesborough's Reports, C. P.
B. and S.	Best and Smith's Reports, Q. B.
Buck	Buck's Reports in Bankruptcy.
Bulst.	Bulstrode's Reports, K. B.
Bunb.	Bunbury's Reports, Ex.
Burge Com.	Burge's Commentaries on Colonial and Foreign Law.
Burr.	Burrow's Reports, K. B.
Burton B.	Burton's Law of Bankruptcy.
Byles B. and N.	Byles on Bills and Notes.
Cald.	Caldecott's Reports, K. B.
Calth.	Calthorpe's Reports, K. B.
Camp. N. P.	Campbell's Reports, N. P.
Camp. Cit.	Campbell on Citation and Diligence.
C. and K. or Car. and Kir.	Carrington and Kirwan's Reports, N. P.
C. and P. or Car. and Pa.	Carrington and Payne's Reports, N. P.
Cart.	Carter's Reports, C. P.
Carth.	Carthew's Reports, K. B.
Cary	Cary's Reports, Chancery.
Ch. Cas.	Cases in Chancery.
Chamb. and Pet.	Chambers and Peterson's Law of Railways.
Ch. R.	Chancery Reports.
Chan. Ru. 1862,	Chancery Rules as to Act of 1862.
Ch. Bills	Chitty on Bills.
Chit. Con.	Chitty on Contracts.
Chitty Com.	Chitty on Commerce and Manufactures.
Ch. Rep.	Chitty's Reports, Bail Court.
Chitty Car.	Chitty on the Law of Carriers.
Cl. and Fin.	Clark and Finnelly's Reports, House of Lords.
Cod. Jur. Civ.	Codex Juris Civilis.
C. Theod.	Codex Theodosiani.
Code Civ.	Code Civil, or Code Napoleon.
Code de Com.	Code de Commerce.
Cod. It.	Codice Civile, New Italian Code.
Co. Rep.	Coke's Reports.
Co. Lit.	Coke upon Littleton.
Coll. Rail.	Collier's Treatise on Railway Law.
Coll. C. C.	Collyer, Chancery Cases.

Coll. Part. or Coll.	Collyer on Partnership.
Comb.	Comberbach's Reports, K. B.
C. B. or Man. Gr. and S.	Common Bench Reports, or Manning, Granger, and Scott's Reports.
C. B. N. S.	Common Bench Reports, New Series.
Com. St. Ord.	Commons Standing Orders.
Com.	Comyn's Reports, K. B. and C. P.
Com. Dig.	Comyn's Digest.
Con. and Law.	Connor and Lawson's Reports, Chancery, Ireland.
Coo. and Al.	Cooke and Alcock's Reports, K. B. Ireland.
Cooke Bank.	Cooke's Bankruptcy Law, 8th ed.
Coop. T. Brougham	Cooper's Reports, C. P.
Cooper	Cooper's Reports, Chancery.
Corpus Jur. Civ. or Dig.	Corpus Juris Civilis or Digestæ.
Cowan Stat.	Cowan's Collection of Statutes.
Cowp.	Cowper's Reports, K. B.
Cox Rep.	Cox's Reports, Chancery.
Cox	Cox on Joint-stock Companies.
Crabb Dig.	Crabb's Digest.
Craig	Craig, Jus Feudale.
Cr. and Ph.	Craig and Phillips, Chancery.
Cr. and St.	Craigie and Stewart's Reports, House of Lords.
C. and J. or Cromp. and J.	Crompton and Jervis' Reports, Ex.
C. and M. or Cromp. and M.	Crompton and Meeson's Reports, Ex.
C. M. and R. or Cromp. M. and R.	Crompton, Meeson, and Roscoe's Reports, Ex.
Cross	Cross's Law of Lien.
Cunn.	Cunningham's Reports, K. B.
D. or Dig.	Justiniani Digestæ.
Dalr.	Dalrymple's Decisions.
Dan. Ch. Pr.	Daniell's Chancery Practice.
Dan.	Daniell's Reports, Ex. Eq.
Darl. Pr.	Darling's Practice.
Dav.	Davy's Reports, Ireland.
Day's Pr.	Davy's Common Law Practice.
D. and M.	Davison and Merivale, Q. B. Reports.
Deac.	Deacon's Bankruptcy Cases.
D. and G. or Deac. and Ch.	Deacon and Chitty's Bankruptcy Reports.
Dean	Dean on the Effects of War.
Dean Block.	Dean on the Law of Blockade.
De G.	De Gex's Bankruptcy Reports.
De G. F. and J.	De Gex, Fisher, and Jones' Reports, Chancery.
De G. and J.	De Gex and Jones' Reports, Chancery.
De G. M. and G.	De Gex, MacNaghten, and Gordon's Reports, Chancery.
De Gex and Sm.	De Gex and Smale's Reports, Chancery.
Deas and And.	Deas and Anderson's Reports.
Dick.	Dickens's Reports, Chancery.
Dirl.	Dirleton's Decisions.
Dickson Ev.	Dickson on Evidence.
Dobie Sty.	Dobie's Collection of Styles.
Domat	Domat's Civil Law.
Doria Bank.	Doria and Macrae's Bankruptcy Law.
Doug.	Douglas's Reports, K. B.
Dow and C.	Dow and Clark, House of Lords Cases.
Dow. and Ry. or D. and R.	Dowling and Ryland's K. B. Reports.
Drewry Inj.	Drewry on Injunctions.
Drew.	Drewry's Reports, Chancery.
Drew. and Sm.	Drewry and Smale's Reports, Chancery.
Drury	Drury's Reports, Chancery, Ireland.

Dr. and Wal.	Drury and Walsh's Chancery Reports, Ireland.
Dr. and War.	Drury and Warren's Chancery Reports, Ireland.
Duff	Duff on Conveyancing.
Duncan's En.	Duncan on Entails.
Duncan's Man.	Duncan's Manual.
Dun. or D.	Dunlop, Bell, and Murray's Reports.
Duranton	Duranton Droit Francais.
Durnf. and E.	Durnford and East on Term Reports, K. B.
Durie	Durie's Reports.
Duvergier	Duvergier, Droit Civil Francais.
East	East's Reports.
Eden	Eden's Reports, Chancery.
Edg.	Edgar's Reports.
Edicta	Edicts of Justinian.
Edw. A. R.	Edwards' Admiralty Reports.
El. B. and S.	Ellis, Best, and Smith's Reports, Q. B.
El. and Bl.	Ellis and Blackburn's Reports, Q. B.
El. B. and E.	Ellis, Blackburn, and Ellis' Reports, Q. B.
El. and El.	Ellis and Ellis' Reports, Q. B.
Eq. Rep.	Equity Reports.
Ersk.	Erskine's Institutes.
Ersk. Pr.	Erskine's Principles.
Esp.	Espinasse's Reports or Digest, N. P.
Evans Traf.	Evans on the Railway and Canal Traffic Act.
Exch. Rep. or Wel. H. and G.	Exchequer Reports, or Welsby, Hurlstone, and Gordon's Reports.
First Rep. Corp. Com.	First Report of Corporation Commission.
Fac. Coll. or F. C.	Faculty Collection.
Falc.	Falconer's Reports.
Far.	Farresley (7 Mod. Rep.).
Ff.	Pandectæ.
Fifth Rep. Ra. Ca.	Fifth Report on Railway and Canal Bills, 1858.
Fin.	Finch's Reports.
Fitz-G.	Fitz-Gibbon's Reports, K. B.
Flan. and K.	Flanagan and Kelly's Reports, Rolls, Ireland.
Fol. Dict. or Dict.	Folio Dictionary.
F. B. C.	Fonblanque's Bankruptcy Cases.
For.	Forrest's Reports, Ex.
Forb.	Forbes' Decisions.
Forester	Forester's Reports, Chancery.
Forsyth Tr.	Forsyth on Trusts.
Fortes.	Fortescue's Reports.
F. and F.	Foster and Finlayson's Reports, N. P.
Fount.	Fountainhall's Decisions.
Fox and S.	Fox and Smith's Reports, K. B. Ireland.
Fraser	Fraser on Personal and Domestic Relations.
Free. Chy.	Freeman's Chancery Reports.
Freem. K. B.	Freeman's Reports, K. B.
Fry Contr.	Fry on Specific Performance of Contracts, including those of Public Companies.
G. and J.	Glyn and Jameson, Bankruptcy Reports.
Gal. and Dav.	Gale and Davison's Reports, K. B.
Gif.	Giffard's Reports, Chancery.
Gilb.	Gilbert's Cases in Law and Equity.
Gilb. R.	Gilbert's Reports.
Gilm.	Gilmour's Reports.
Glassc.	Glasscock's Reports in all the Courts, Ireland.

Godb.	Godbolt's Reports, K. B.
Golds.	Goldesborough's Reports, K. B.
Gosf.	Gosford's Reports.
Gow	Gow on Partnership.
Gow's N. P. C.	Gow's Nisi Prius Cases.
Grant	Grant on Corporations.
Grant Bank.	Grant's Law of Banking.
H. and C.	Hurlstone and Coltman's Rep. Exch.
H. and N.	Hurlstone and Norman's Rep. Exch.
Ha. and Tw.	Hall and Twell's Chancery Reports.
Had.	Haddington's Reports.
Hag. Adm.	Haggard's Admiralty Reports.
Hailes	Hailes' Decisions.
Harc.	Harcarse's Decisions.
Hard.	Hardre's Reports, Ex.
Hare or Ha.	Hare's Reports, Chancery.
Harr. Dig.	Harrison's Digest.
Hay Li.	Hay's Law of Liability.
Hayes	Hayes' Reports, Exchequer, Ireland.
Hayes and J.	Hayes' and Jones' Reports, Exchequer, Ireland.
Hem. and M.	Hemming and Miller, Chancery.
Het.	Hetley's Reports, C. P.
H. L. Rep. or Cases	Clark and Finnelly's House of Lords Reports, New Series.
Hob. Rep. or Hob.	Hobart's Reports, K. B.
Hodge Rail.	Hodge's Law of Railways.
Hog.	Hogan's Reports, Rolls, Ireland.
Holland	Holland's Common Law Procedure Act.
Holt	Holt's Reports, K. B.
Holt N. P.	Holt's Nisi Prius Reports.
Home (Clk.)	Home's Reports.
Hope	Hope's Reports.
Hov. Suppl.	Hoveden's Supplement to Vesey Junior's Rep. Ch.
Hud. and B.	Hudson and Brooke's Reports, K. B. Ireland.
Hume Com.	Hume's Commentaries on Criminal Law.
Hume	Hume's Decisions.
Hunter	Hunter's Law of Landlord and Tenant.
Hut.	Hutton's Reports, C. P.
Ingram's Comp.	Ingram's Treatise on Compensation for Interest in Lands, etc., payable by Public Companies.
Inst.	Institutes of Justinian.
Ir. Law and Eq.	Irish Law and Equity Reports.
Ir. Law and Ch.	Irish Law and Equity Reports, New Series.
Iv. Ersk.	Ivory's Erskine's Institutes.
Ivory Pro.	Ivory's Forms of Process.
J. and W. or Jac. and W.	Jacob and Walker's Reports, Chancery.
Jac. or Jacob	Jacob's Reports, Chancery.
James	James's Treatise on Friendly Societies.
Jar. and Bythe.	Jarman and Bythewood's Conveyancing.
Jebb and B.	Jebb and Bourke's Reports, K. B. Ireland.
Jebb and S.	Jebb and Syme's Reports, K. B. Ireland.
Jenk.	Jenkins' Reports, Ex.
John.	Johnson's Reports, Chancery.
John. and H.	Johnson and Hemming's Reports, Chancery.
Jones Bail.	Jones on the Law of Bailments.
Jones	Jones' Reports, Exch. Ireland.
Jones T. and Jones W. or Jones W. and T.	Jones' Reports, K. B.

Jones and C.	Jones and Carey's Reports, Exch. Ireland.
Jo. and Lat.	Jones and Latouche's Reports, Chancery, Ireland.
Jour. Jur.	Journal of Jurisprudence.
Jur. (Sc.). In the present work it is referred to simply as Jur.	Jurist, Scottish.
Jur. In the present work it is referred to as E. Jur.	Jurist, English.
Jur. N. S. In the present work it is referred to as E. Jur. N. S.	Jurist, English, New Series.
Jur. St.	Juridical Styles.
Just. Inst. or Inst. Just.	Justinian's Institutes.
Kames	Kames' Decisions.
Kames Eluc.	Kames' Elucidations.
Kames Rem. D.	Kames' Remarkable Decisions.
Kames Tr.	Kames' Historical Law Tracts.
Kames Eq.	Kames on Equity.
Kay	Kay's Reports, Chancery.
Kay and J.	Kay and Johnson's Reports, Chancery.
Keb.	Keble's Reports, K. B.
Keen	Keen's Reports, Rolls Court.
Kel.	Kelyng's Reports, K. B.
Kel. 1, 2, or Kel. Ch.	Kelynge's Reports, Chancery.
Keilw. or Kel.	Keilwey's Reports, K. B.
Kent. Comm.	Kent's Commentaries on the Law of the United States.
Kilk.	Kilkerran's Decisions.
Kin. Bank.	Kinnear on Bankruptcy.
La. or Lane	Lane's Reports, Exchequer.
Lat.	Latch's Reports, K. B.
L. J. or Law Jour.	Law Journal Reports.
L. Mag.	Law Magazine.
Law Rec.	Law Recorder, Irish Reports.
Law Rep.	Law Reports.
L. Rev.	Law Review.
L. T.	Law Times.
Leg. O.	Legal Observer.
Leon. or Le. Rep.	Leonard's Reports, K. B.
Les Ord.	Les Ordonnances 1673, 1681, 1687, generally quoted in full.
Levi Int. Com.	Levi's International Law.
Lev.	Levinz's Reports, K. B.
Lewin	Lewin on Trusts.
Lex Merc. Red.	Lex Mercatoria by Beawes.
Ley.	Ley's Reports, K. B.
Lindley	Lindley's Law of Partnership.
Lindley Supp.	Lindley's Supplement.
Lit.	Littleton's Reports, C. P.
Liver. Ag.	Livermore's Treatise on Agency.
L. and Welsb.	Lloyd and Welsby's Commercial Reports.
L. M. and P. or L. and M.	Lowndes, Maxwell, and Pollock's Rep.
Longf. and T.	Longfield and Townsend's Reports.
Long Quinto	Year Book, Pt. 10, K. B.
Ld. Ken.	Lord Kenyon's Reports.
Ld. Ray.	Lord Raymond's Reports.
Llo. and Goo.	Lloyd and Good's Reports, Chancery, Ireland.
Lo. St. Or.	Lords' Standing Orders.
Lush. Steph.	Lushe's Practice by Stephen.

Lut.	Lutwiche's Reports.
Lush.	Lushington's Admiralty Reports.
Macb. Dig.	Macbrair's Digest.
M'Cle.	M'Cleland's Reports, Ex.
M'Cle. and Yo.	M'Cleland and Young's Reports.
M'F. P.	Macfarlane, Practice of the Jury Court.
M'F. Re.	Macfarlane's Reports.
M'F. and Cleg.	Macfarlane and Cleghorn on Issues.
Mack.	Mackenzie's Institutions of the Law of Scotland.
Mack. R. L.	Mackenzie's Roman Law.
Maclaren Tr.	Maclaren on Trusts.
Macl. and R.	Maclean and Robinson's Scotch Appeals.
Mac. and G.	Macnaghton and Gordon's Reports, Chancery.
Macph.	Macpherson's Court of Session Cases.
Macq. H. L. Cas.	Macqueen's Scotch Appeal Cases.
Madd.	Maddock's Reports, Chancery.
Maddox	Maddox's Firma Burgi.
Mal.	Malyne's Lex Mercatoria.
Man. and G.	Manning and Granger's Reports, C. P.
Man. and Ry.	Manning and Ryland's Reports, K. B.
Mar.	March's Reports, K. B.
Marshall's Rail. Co.	Marshall on Obligations of Railway Companies considered as Carriers.
Marshall's Mar. Ins.	Marshall on Marine Insurance.
Marsh.	Marshall's Reports, C. P.
M. and S. or Mau. and Sel.	Maule and Selwyn's Reports, K. B.
Mayne Dam. Comp.	Mayne's Treatise on Compensation under Lands Clauses Act.
M. and W. or Mee. and W.	Meeson and Welsby's Reports.
Menzies' Lec.	Menzies on Conveyancing.
Mer. or Meriv.	Merivale's Reports, Chancery.
Mod. Rep.	Modern Reports, K. B.
Montague Part.	Montague on Partnerships.
Mont. B. C.	Montague's Reports, Bankruptcy.
M. and Ayr. R.	Montague and Ayrton's Reports, Bankruptcy.
Mont. and B.	Montague and Bligh's Reports, Bankruptcy.
Mont. and Chit.	Montague and Chitty's Reports, Bankruptcy.
M. and M'A.	Montague and M'Arthur's Reports, Bankruptcy.
M. D. and D.	Montague, Deacon, and De Gex's Reports, Bankruptcy.
Moo. and M.	Moody and Malkin's Reports, N. P.
Moo. and R.	Moody and Robinson's Reports, N. P.
Mo.	Moore's Reports, K. B.
Moore (C. P.)	Moore's Common Pleas Reports.
Moo. J. B.	J. B. Moore's Reports, C. P.
Moo. and P.	Moore and Payne's Reports, C. P.
Moo. and S.	Moore and Scott's Reports, C. P.
More Lec.	More's Lectures.
More St.	More's Stair's Institutes.
Morr. or M.	Morrison's Dictionary.
Mos.	Moseley's Reports, Chancery.
Murdoch Bank.	Murdoch's Law of Bankruptcy.
Murray or Mur.	Murray's Jury Court Reports.
Myl. and Cr.	Mylne and Craig's Reports, Chancery.
Myl. and K.	Mylne and Kames' Reports, Chancery.
Napier Presc.	Napier on Prescription.
N. Benl.	New Benloe Reports, K. B.
Nels.	Nelson's Reports, Chancery.
N. L.	Nelson's Lutwyche Reports, C. P.

N. R.	New Reports.
N. R.	New Reports (Bosanquet and Puller, C. P.).
Nev. and Man.	Neville and Manning's Reports, K. B.
Nev. and P.	Neville and Perry's Reports, K. B.
Nic. Ha. and C.	Nicholl, Hare, and Carrow, Railway Cases.
North.	Northington's Reports, Chancery.
Nov. or N.	Novella Juris Civilis.
Noy.	Noy's Reports, K. B.
O. Benl.	Old Benloe, C. P.
Orl. Bridgman	Orlando Bridgman's Reports, C. P.
Ow.	Owen's Reports, K. B.
Π. or π.	The Digests or Pandects.
Pal.	Palmer's Reports, K. B.
Pand. or Ff.	Pandectæ.
Park's Ins.	Park on Insurance.
Park. Adj.	Parker on Adjudication.
Par.	Parker's Reports, Ex.
Pat. Comp.	Paterson's Compendium of English and Scotch Law.
Pat. App. Cas.	Paton's Appeal Cases.
Pea.	Peake's Reports, N. P.
Peak. Ad. Cas.	Peake's Additional Cases.
Peak. N. P. C.	Peake's Nisi Prius Cases.
Penfold	Penfold's Law of Rating Railway and other Companies.
P. D. or Per. and Dav.	Perry and Davison's Reports, K. B.
Phill. Com.	Phillimore's Commentaries.
Phillips Ins.	Phillips on Insurance.
Ph.	Phillips' Reports, Chancery.
Pl. Com.	Plowden's Commentaries or Reports, K. B.
Pol.	Pollexfen's Reports, K. B.
Poph. and 2 Poph.	Popham's Reports, K. B.
Pothier de So.	Pothier de Société.
Pothier Obli.	Pothier on Obligations by Evans.
Pothier ad Pand.	Pothier ad Pandectus.
Pr. Falc.	President Falconer's Reports.
Price or Pr.	Price's Reports, Ex.
Pratt's Contr.	Pratt's Contraband of War.
Pratt's Friend. So.	Pratt's Friendly Societies.
P. W.	Peere William's Rep. Chancery.
Q. B.	Queen's Bench Reports, Adolphus and Ellice, New Series.
Q. Attach.	Quoniam Attachiamenta.
Quinti Quinto	Year Book, 5 Henry v.
Rail. C. or Ra. Cas. or Ra. Ca.	Railway Cases.
Ray. T.	Raymond's Reports, K. B.
Reg. Maj.	Regiam Majestatem.
Rep. Ch.	Reports in Chancery.
Rep. Eq.	Gilbert's Reports in Equity.
Rep. Q. A.	Reports *temp.* Queen Anne.
Rep. *temp.* Finch	Reports by Finch, Chancery.
Ridgw. App.	Ridgway's Appeals, Ireland.
Robert. App.	Robertson's Appeal Cases, House of Lords.
Robertson Bank.	Robertson's Handbook of Bankers' Law.
Ross	Ross's Reports, Bankruptcy.
Ross B. Dict.	Ross's Bell's Dictionary.
Ross L.	Ross's Lectures.
Ross L. C.	Ross's Leading Cases.

Ross L. Ca. Com. or Ross L. C. C.	Ross's Leading Cases on Commercial Law.
Russel Arb.	Russell on Arbitration.
Russ.	Russell's Reports, Chancery.
Russ. and M.	Russell and Mylne's Reports, Chancery.
Ry. and M.	Ryan and Moody's Reports, N. P.
Salk.	Salkeld's Reports, K. B.
Saund.	Saunders' Reports, K. B.
Sau. and Sc.	Sause and Scully's Reports, Rolls, Ireland.
Sav.	Savile's Reports, C. P.
Savigny	Savigny on the Roman Law.
Savigny Sys.	Savigny's System.
Say.	Sayers' Reports, K. B.
Sch. and Lef.	Schoall and Lefroy's Reports, Chancery, Ireland.
Scott or Sco.	Scott's Reports, C. P.
Sco. N. R.	Scott's New Reports, C. P.
Sc. Jur., in this work referred to as Jur.	Scottish Jurist.
Sec. Mer. Re. Law Com.	Second Mercantile Report of Law Commission.
S. C. C. or Sel. Ca.	Select Chancery Cases.
Shand Pr.	Shand's Practice.
S. or S. D. or Sh.	Shaw and Dunlop's Reports.
Sh. App.	Shaw's Appeals.
Sh. Bell Com.	Shaw's Bell's Commentaries.
Sh. Dig.	Shaw's Digest.
Sh. and M'L.	Shaw and Maclean's Appeals.
Shelf. Rail.	Shelford's Law of Railways.
Show.	Shower's Reports, K. B.
Sid.	Siderfin's Reports, K. B.
Simon Rail. Ac.	Simon's Law of Railway Accidents.
Sim. or Sim. N. S.	Simons or Simons's New Series of Reports, Chancery.
Skin.	Skinner's Reports, K. B.
Sm. and G.	Smale and Giffard's Reports, Chancery.
Sm. L. C.	Smith's Leading Cases.
Sm. Merc. Law	Smith's Compendium of Mercantile Law.
Smith's Rep.	Smith's Reparation.
Smith	Smith's Reports, K. B.
Smi. and Bat.	Smith and Batty's Reports, K. B. Ireland.
Smythe	Smythe's Reports, C. P. Ireland.
Sol. Jour.	Solicitor's Journal.
Spottis.	Spottiswoode's Reports.
Stair or St.	Stair's Institutions.
Stair	Stair's Reports.
Stark	Stark's Treatise on Partnership.
Stark. N. P.	Starkie's Reports, N. P.
Steph. Com.	Stephen's Commentaries on the Laws of England.
Story L. U. S.	Story's Laws of the United States.
Story B. Exch.	Story's Bills of Exchange.
Story Con.	Story's Conflict of Laws.
Story Ag.	Story on Agency.
Story Bail.	Story on Bailments.
Story Part.	Story on Partnership.
Story Pr.	Story's Promissory-Notes.
Stuart	Stuart, Milne, and Peddie's Reports.
Stra.	Strange's Reports, K. B.
Sty.	Styles' Reports, K. B.
Sug. V. and P.	Sugden's Vendors.
Sug. P.	Sugden's Powers.
Swa. Ad.	Swabey's Admiralty Reports.

Swans.	Swanston's Reports, Chancery.
Taml.	Tamlyn's Reports, Rolls.
Taunt.	Taunton's Reports, C. P.
T. R. or Durn. and East.	Term Reports, Durnford and East.
Th.	Thomson on Bills and Notes. Wil. Th.—New Edition by Dove Wilson.
Thoms Ju. Fac.	Thoms on Judicial Factors.
Thring	Thring on Joint-stock Companies.
Tinw.	Tinwald's Reports.
Tidd P.	Tidd's Practice.
Toth.	Tothill's Reports, Chancery.
Tudor Ca. M. L. or Tudor's Le. Cas.	Tudor's Leading Cases on Mercantile Law.
Tudor Cas. Pr.	Tudor's Leading Cases on Real Property.
Turn. and R.	Turner and Russell's Reports, Chancery.
Tyrw.	Tyrwhitt's Reports, Exchequer.
Tyrw. and G.	Tyrwhitt and Granger's Reports, Exchequer.
Ulp.	Ulpian Fragmenta.
Vaugh.	Vaughan's Reports, C. P.
Vent.	Ventris's Reports, K. B.
Vern.	Vernon's Reports, Chancery.
Vern. and S.	Vernon and Scriven's Reports, K. B. Ireland.
Ves.	Vesey's Reports, Chancery.
Ves. Jun.	Vesey Junior's Reports, Chancery.
V. and B. or Ves. and Bea.	Vesey and Beames's Reports, Chancery.
Vin. Abr.	Viner's Abridgment.
Vin. Supp.	Viner's Supplement.
Vin. Inst.	Vinnius Institutiones.
Voet.	Voetius ad Pandectas.
Wallis	Wallis's Reports, Chancery, Ireland.
Warnk. Com.	Warnkœnig's Commentaries.
Watson	Watson on Partnership.
Watson Arb.	Watson on Arbitration.
W. R.	Weekly Reporter.
Westlake Confl.	Westlake's Conflict of Laws.
West H. L.	West's Reports, House of Lords.
West and H.	West's Reports, Chancery.
Whart. L. L.	Wharton's Law Lexicon.
Wils. Ch.	Wilson's Chancery Reports.
Wils. Ex.	Wilson's Exchequer Reports.
Wils.	Wilson's Reports, K. B.
W. and S. App.	Wilson and Shaw's Reports, House of Lords.
Wils. Th.	Wilson's Thomson on Bills and Notes.
Wight.	Wightwicke's Reports, Exchequer.
Willes	Willes's Reports, K. B. and C. P.
Wms.	Williams' Reports, Chancery.
Wm. Rob.	William Robinson's New Admiralty Reports.
Woolrych	Woolrych on the Law of Ways.
Wordsworth	Wordsworth on Joint-stock Companies.
Y. B.	Year Books.—The initial letter of the king's reign is generally prefixed or added. Sometimes the Y. B. is omitted.
Yelv.	Yelverton's Reports, K. B.
You.	Younge's Reports, Exchequer.
Y. and C. C. C.	Younge and Collyer's Chancery Cases.
Y. and J. or You. and Jer.	Young and Jervis' Reports, Exchequer.

ERRATA.

Page 432, note (*a*), Hall *v.* Hall, 20 Beav. 139.
Page 798, note (*c*), *for* 252, *read* 512.
Page 860, note (*c*), *for* Crown, *read* Crum.
Page 188, note (*c*), *for* Pro *read* No.
Page 212, note (*a*), *for* Monach's Trs., *read* Monach's Creds. *v.* The Trustee.
Page 252, note (*a*), *for* Morrin *read* Morison *v.* Boswell.
Page 252, note (*a*), *for* Shirra, etc., *read* King *v.* Shirra, 1827, 5 S. 215.
Page 501, *for* Tushey *read* Tuohey.
Page 688, note (*b*), Struthers is reported as Barr *v.* Spiers.
Page 323, *for* 'a charge has been given to,' *read* a decree has been obtained against.
Page 281, note (*a*), Brown *v.* Edgley, 1014, *read* Broom *v.* Edgley, 1087.
Page 657, note (*f*), *for* 1 Wilson, *read* 1 J. and W. 267.

OMISSA.

Page 272, note (*b*), Ker *v.* M'Kechnie, 1845, 7 D. 494. Note (*c*), Buchanan and Co. *v.* Adam, 1833, N. S. 762; Nisbet *v.* Taylor's Exrs., 1840, 3 D. 332.
At top of page 648 add, 'but not for attaching such as are declared moveable by statute,' Sinclair *v.* Staples, 1860, 22 D. 600.

ADDENDA.

Partnership Articles.

Construction of provisions creating a right of pre-emption.—*Homfray* v. *Fothergill*, 1866, 1 Law Rep. (Equity) 567.

Adoption of Liabilities of an Old Firm by a New.

Rolfe and the Bank of Australasia v. *Flower and Co.*, 1866, 1 Law Rep. (Judicial Committee Appeals) 27.

Powers of Majorities.

To lease company property.—*Featherstonhaugh* v. *Lee Moor Porcelain Co.*, 1865, 1 Law Rep. (Equity) 318.

When a company is formed for working a patent, it is not *ultra vires* to purchase the patent.—*British and Foreign Cork Co.* (Leifchild's case), 1865, 1 Law Rep. (Equity) 231.

Quasi Partnership.

Application of the doctrine that agency is a test of the partnership relation. —*Bullen* v. *Sharp*, 1866, 1 Law Rep. (Common Pleas) 86. This case is valuable for the opinions of the judges.

Allotment of Shares.

Allotment of shares must be made within a reasonable time, otherwise it does not bind the applicant.—*Ramsgate Victoria Hotel Co.* (*Limited*) v. *Montefiore*, 1866, 1 Law Rep. (Exch.) 109.

Repudiation of Contract to become a Shareholder.

A person who had been induced to take shares in a company on the faith of representations which he afterwards discovered to be false, but who, subsequently to this discovery, instructed his broker to sell the shares, was found not entitled to avoid the contract, and so escape from the liabilities of a contributory in the winding up.—*Hop and Malt Exchange and Warehouse Co.* (*ex parte Briggs*), 1 Law Reports (Equity) 483.

Who are Contributories.

A party who had signed articles of association for twenty-five shares, but had applied for fifty shares and no allotment was made, was found to be a contributory for twenty-five shares only.—*Llanharry Hæmatite Iron Co.* (*Tothill's* case), 1865, 1 Law Rep. (Chancery Appeals) 85.

A party was found to have become a shareholder by offer and acceptance to take shares, and therefore liable to be made a contributory, but not as to four shares for which he had also made an offer, but in the acceptance relative to which a condition of forfeiture was added, which formed a variance of the contract, and which variance was not agreed to by payment within the prescribed time.—*Leeds Banking Co.* (*Addinell's* case), 1865, 1 Law Rep. (Equity) 225.

Executors who accept shares must be put on the list in their own and not in their representative character.—*Fearnside and Dean's* case, 1865, 35 Law Jour. (Chancery) 75.

All agreements with directors whereby a shareholder may by payments or

otherwise be relieved from liability to become a contributory are invalid.—*Agriculturalist Cattle Insurance Co.* (*Stanhope's* case), 1 Law Rep. (Chancery Appeals) 161.

Winding up.

The 165th section of the Companies Act of 1862, which empowers the Court to compel payment by directors and officers of companies in respect of misfeasance or breach of trust relating to the affairs of the company, does not apply as against the executors of a deceased director.—*Re East of England Bank* (*Feltom's Exrs.* case), 1865, 1 Law Rep. (Equity) 219.

The Court will not at the instance of contributories interfere with a voluntary winding up under supervision, except where the resolution for winding up voluntarily has been obtained by fraud, or by an inequitable overbearing of the rights of a dissentient minority by improper influence.—*Re London and Mercantile Discount Co.*, 1865, 1 Law Rep. (Equity) 277.

Remuneration of Officials.

A proposal to give large sums to the chairman and other officials of a railway company which had been dissolved by amalgamation was held to be beyond the powers of the company, which still subsisted for the purposes of winding up, and question whether railway companies have power to apply their revenue in giving their servants compensation for loss of office in consideration of past services.—*Clouston, etc.* v. *Edinburgh and Glasgow Ra. Co.*, 1865, 4 Macph. 207.

Meetings of Shareholders.

A proposal to vote large sums to officials for long and faithful services held to be business of a nature which could not be entered upon at a half-yearly statutory meeting without special notice.—*Clouston, etc.* v. *Edinburgh and Glasgow Ra. Co.*, 1865, 4 Macph. 207.

Lands Clauses Act.

To what extent adjacent lands can be regarded as part of a house. The general principle is, that such only are to be so regarded as would pass under a devise or conveyance of the 'house' without further specification.—*Steele* v. *The Midland Ra. Co.*, 1866, 1 Law Rep. (Equity Appeals) 275.

Compensation for injury to lands by railway vibration. *Brand* v. *Hammersmith and City Ra. Co.*, 1865, 1 Law Rep. (Queen's Bench) 130.

Railway Clauses Act.

Level crossings—negligence in respect to. See *Stapley* v. *London, Brighton, and South Coast Ra. Co.*, 1865, 1 Law Rep. (Exch.) 21; *Stubley* v. *London and North-Western Ra. Co.*, 1865, 1 Law Rep. (Exch.) 13.

Arbitration.

In an action against a railway company upon an award of an arbitrator appointed to determine a claim under the Lands Clauses Act, it was pleaded in defence that the award was void by reason of its giving compensation for what was not injuriously affected. It was held on demurrer that the plea was good; in other words, the relevancy of the defence was sustained.—*Beckett* v. *Midland Ra. Co.*, 1866, 1 Law Rep. Common Pleas, 241.

Private Act.

Previous agreement allowed to be equitably pleaded in derogation of.—*Savin* v. *Hoylake Ra. Co.*, 1865, 1 Law Rep. (Exch.) 9.

Bye-laws.

Bye-laws will be so interpreted as not to bear oppressively on the public, and will only be capable of enforcement in so far as their provisions are reasonable. —*Jennings* v. *Great Northern Ra. Co.*, 1865, 1 Law Rep. (Queen's Bench) 7; *Dearden* v. *Townsend*, 1865, 1 Law Rep. (Q. B.) 10.

Inequality of Charges.

See *Baxendale* v. *London and South-Western Ra. Co.*, 1866, 1 Law Rep. (Exch.) 137; *Sutton* v. *South-Eastern Ra. Co.*, 1 Law Rep. (Exch.) 32; *Napier* v. *Glasgow and South-Western Ra. Co.*, 1865, 4 Macph. 87.

Public Burdens.

Amount of deduction to which, in relation to poor-rates, a railway company is entitled in respect of repairs made on the line, etc.—*Edinburgh and Glasgow Ra. Co.* v. *Hall*, 1866, 4 Macph. 301.

Construction of 5 and 6 Vict. c. 79, in relation to railway passenger trains duty in the case of cheap trains.—*Great Western Ra. Co. and Others* v. *Attorney-General*, 1866, 1 Law Rep. (English Appeals) 1.

Costs in Winding up.

After advertisement, any party entitled to appear and oppose, who does so successfully, is entitled to costs, though he had not been served with the petition. —*Re Marlborough Club Co.*, 1865, 1 Law Rep. (Equity) 216.

An order for winding up of a company is notice of discharge to the servants. —*Chapman's* case, 1865, 1 Law Rep. (Equity) 346.

The claim of a lessor, who had leased a quarry to the company for twenty-seven years and a half, was ordered to be entered for the value of the future rent, —the order to be without prejudice to any application to dissolve the company; but no order for dissolution to be made without notice to the lessor.—*Haytor Granite Co.*, 1865, 1 Law Rep. (Chancery Appeals) 77.

Amalgamation.

Amalgamation by special act does not affect clauses of arbitration in previous contracts, or give a new meaning to their provisions.—*Re Wansbeck Ra. Co.* v. *Townsend*, 1866, 1 Law Rep. (Common Pleas) 269.

Rights of Executors.

A husband by the settlement of his deceased wife acquired right to certain shares in a joint-stock company, from which, and the profits of which, his *jus mariti* had been excluded. These shares he sold to the company. After his death, the executor of the predeceasing wife sued the company for the undivided profits which had accrued during her life, alleging that the company, instead of dividing, had fraudulently concealed them. Averments by the pursuer, which were held sufficient to cover a case in which undivided profits, fraudulently withheld, might be held not to have been incorporated with the shares or transferred with them, and inquiry allowed.—*Hunter and Others* v. *Carron Co. and Others*, 1865, 4 Macph. 216.

A TREATISE

ON THE

LAW OF PARTNERSHIP AND JOINT-STOCK COMPANIES.

INTRODUCTION,

CONTAINING AN HISTORICAL SKETCH OF THE LAW OF PARTNERSHIP AND JOINT-STOCK COMPANIES IN SCOTLAND, AND EXPLAINING THE OBJECTS AND PLAN OF THE TREATISE.

UNTIL a comparatively recent period, Scotland could not be called a mercantile country. The long continued wars with England, the prevalence of internal dissensions, the pressure of feudalism in its most rigorous form, were causes that combined to check the rising spirit of commercial adventure, and to neutralize the advantages of that insular situation which Scotland as well as England enjoys.

Early traces of private partnerships.

Towards the close of the sixteenth century a brighter era began to dawn over Scotland: her commercial relations with the continent of Europe began to multiply; and we soon find her carrying on a regular and increasing trade with the Low Countries, but more especially with France. It is at this period that the partnership relation emerges into notice; and soon after, the earliest decided cases, though few and meagre, begin to appear in our judicial records.

Foreign origin and character.

There is great reason to believe that the laws of England and Scotland were, at a remote period, very similar, if not identical. But however this may have been, it is certain that, prior to the sixteenth century, a wide divergence had taken place, due partly to the long wars between the two countries, and partly to the close relations which during all that period subsisted between Scotland and the

continent of Europe. It is not therefore a matter of surprise to the student of Scottish history, that the laws of Scotland should, for a century or two prior to the Union, present a somewhat foreign appearance, and exhibit a much closer resemblance to continental than to English jurisprudence. To this the law of partnership formed no exception; and its earlier traces, though few and indistinct, are found to point unmistakeably to a system adopting the principles of the Roman *Societas*, as these had been modified and extended by the Dutch, and more particularly by the French mercantile usages.

This system of partnership law, though not of native growth, appears to have been characterized by great breadth and elasticity; and to have contained within itself the germs of those important provisions which the Imperial legislation has at length adopted in the late Registration Acts. Thus it appears, that during the seventeenth and the earlier part of the eighteenth century, the important principle that a copartnery, or society, is a separate *persona* from the members composing it, had been fully established; and there seems no reason to doubt, that if this and kindred principles had been developed by equitable tribunals dealing with questions presented by commercial relations sufficiently numerous and varied, a system of partnership law would, almost independently of legislative interference, have long since grown up, which, while checking reckless speculation, would have enabled *bona fide* associations to attain the benefits of *Limited Liability* (*a*).

The breadth of area necessary for the elaboration of such principles was not, however, to be found in Scotland, whose mercantile relations, whether external or internal, still continued scanty in the extreme. Hence the Scotch law of 'society' never developed itself into a complete, or even a consistent system. About the middle of the last century, it may be said to have almost touched the doctrine of limited liability; but it had not yet coupled this with the corrective principle of registration, so familiar in other branches of the law of Scotland.

Shortly after this period, all further development of the original Scottish law of society was arrested by the introduction of doctrines drawn from the English law of partnership, often imperfectly

(*a*) See Chapters on Liability of Partners, and on Suing and being Sued.

understood; and which indeed could scarcely have worked beneficially, unless coupled with all the other principles which, in the English system of jurisprudence, limited their application and supplied their defects.

As we shall afterwards see, the English law never recognised the existence of even a *quasi persona* in any society other than a proper corporation, but always refused to see anything in a partnership, however large, beyond a mere aggregation of individuals. Nay, soon after the middle of last century, the pressure of this English doctrine began to be felt in the Scotch law of partnership; and since that period it has continued to operate with increased force, until the effects of the old Scottish doctrine of the *quasi persona* have become greatly weakened, and even entirely eliminated from some departments of partnership law.

Gradual approximation of the two laws.

In other respects also, the English and Scottish systems of partnership law have, since the middle of last century, been gradually approaching each other. This process has gone on silently, and almost unconsciously. English principles have been infiltrated into the Scottish practice, partly through the medium of the appellate jurisdiction, and partly from the habit of quoting English authorities before the tribunals; nor must it be forgotten, that in a large class of cases presenting questions of novelty, both systems have taken a simultaneous development in the same direction.

At the present time, the English and Scottish systems of partnership law, as regards private firms and simple partnerships, may be said to resemble each other so closely, that in many respects they are coincident. But they still differ on some important points, and will often be found attaining the same equitable results by very different *media*. These variances are sometimes traceable to an original difference in principle, but more frequently to differences in other branches of the respective laws of the two countries, which, as they run into and affect the law of partnership, communicate to it their distinctive colouring.

UNINCORPORATED COMPANIES.

Origin of unincorporated companies.

When, on the cessation of the civil wars, the material resources of this country, as well as of England, began to develop themselves,

and the energies of the people were directed to commercial enterprise, many undertakings presented themselves, calculated not less to benefit the public than their promoters. Large capital was required for such undertakings, and this could only be raised by means of associations containing a great number of shareholders. The management of these associations had, in consequence of their very size, to be entrusted, not to their members, but to officers or directors appointed for the purpose. And it soon became evident, that it would greatly conduce to their prosperity, if the members, whose contributions consisted merely of money, should be able to transfer their shares like other marketable commodities. Thus by degrees, as called forth by the exigencies of advancing commerce, the joint-stock company evolved itself out of the private partnership.

To associations of this kind the principles of the Roman *Societas*, or the common law partnership, were applicable only by analogy; yet there is reason to believe, that had it not been for the interference of the Legislature, and the hostility of the tribunals, the common sense of the mercantile community would have established a system of consuetudinary law sufficient for the regulation of joint-stock companies in all ordinary cases. This would have been more certainly the result in Scotland, where, as already pointed out, the separate *persona* of an ordinary partnership was distinctly recognised.

6 Geo. I. c. 18.

But towards the beginning of the last century a spirit of reckless speculation began to manifest itself in England, giving birth to a number of futile, and, as it proved, ruinous projects; and among others, to the celebrated South Sea scheme. The monetary embarrassment and wide-spread misery which this baseless undertaking produced, led to the enactment of 6 Geo. I. c. 18, commonly known as the '*Bubble Act*.' This statute, on the recital, that 'whereas in many cases undertakers or subscribers have presumed to act as if they were corporate bodies, and have pretended to make their shares transferable or assignable without legal authority either by Act of Parliament or charter from the Crown for so doing,' enacts that all such undertakings and attempts shall be deemed 'illegal' and 'void,' and put down as 'common and public nuisances.'

Non-observance of its provisions.

If this enactment had been rigorously carried out, the existence of joint-stock companies, otherwise than by charter or statute, would have been impossible. But as soon as the losses and panic caused

by the South Sea scheme and its accompanying bubbles began to fade from the public mind, it became evident that the Legislature had gone too far in its well-meant endeavours to check unprincipled speculation; and, accordingly, it would seem that, notwithstanding the Bubble Act, joint-stock companies, after a temporary check, went on increasing both in number and importance. In Scotland it does not appear that the Bubble Act ever received much attention (*a*); for in the preamble to the 6 Geo. IV. c. 131 (1825), it is stated that the practice had prevailed in Scotland of instituting societies having joint stocks, with shares either transferable or conditionally transferable for the 'purpose of carrying on banking and other commercial concerns, many of which had transacted business for a number of years to the advantage of that country.' The Bubble Act was virtually repealed by the 6 Geo. IV. c. 91.

Hostility of the tribunals in England.

But the consequences of hasty legislation were not the only difficulties with which the joint-stock company principle had to struggle. In England, the tribunals both of law and equity appear to have been hostile to the very existence of such associations from their first appearance. The English law of partnership, as not recognising the *persona* of the firm, was at the outset a very unpromising stock on which to engraft the requirements of the joint-stock company; but there is reason to believe that the courts greatly intensified the evils of the existing law beyond what would have resulted from the most judaical interpretation. By a rigorous, and one should say a senseless application of the principle, that a company, however large, was a mere aggregation of individuals, the courts of equity as well as of law refused all action to companies against their members, and to all members against their companies; and indeed refused to interfere in any circumstances, except on condition that the concern should be wound up. This state of matters called loudly for legislative interference; and hence the origin of the Registration Acts, which were introduced into England long before it was deemed necessary to extend their operation to this part of the kingdom.

(*a*) The only case in which it seems to have been referred to was that of the *Masons of the Lodge of Lanark* v. *Hamilton, etc.*, 1730, M. 14554. But here the judgment seems to have proceeded on the common law rather than on the statute.

Effect of this in Scotland.

In Scotland, the law of private partnership, inasmuch as it recognised the separate person of the firm, formed a much more favourable point of departure for the joint-stock company; and our Scottish tribunals, instead of being opposed to such associations, were apparently inclined to foster their interests, by giving as elastic an interpretation as possible to the law of partnership. Yet, as already mentioned, the pressure of English notions appears to have arrested the natural development of the Scottish principles of '*Society*;' and to have banished from our legal system all traces of the *Société en commandite*, which seems at an early period to have been finding its way into Scotland.

Still, though the law of Scotland in relation to the unincorporated joint-stock company has not received due development, in consequence of external pressure and the want of a more extended commerce, its principles, even as they now exist, appear to be fundamentally sounder than those adopted in English law. Indeed, so satisfactorily did the Scottish law of joint-stock companies work before the introduction of the Registration Acts, that except for the purpose of attaining limited liability, and more precision in management, the want of such enactments was scarcely felt; while in England the evils of the existing system had become so intolerable, that legislative interference was altogether indispensable (*a*).

COMPANIES INCORPORATED BY ACT OF PARLIAMENT, ROYAL CHARTER, OR REGISTRATION.

Origin of incorporated companies.

From a very early period in the history of Great Britain, the Crown had been in use, by an exercise of prerogative, to erect corporations with the usual privileges of perpetual succession, power of acting and transacting in the corporate name like a natural person, and with authority to make bye-laws to bind their own members. Limitation of liability to the funds of the company was also a necessary consequence of incorporation (*b*). When, therefore, at a later period, commercial undertakings were projected of a nature requiring greater privileges than the mere joint-stock company as existing at common law could furnish, recourse was had to incor-

(*a*) See Report of Mercantile Law Commission, 1854-5.
(*b*) See Chapter on Chartered Companies.

poration by royal charter; and many undertakings of the utmost benefit to the country have been carried out in this manner. If, again, as was often the case in later times, the projected schemes required to possess special and aggressive powers in addition to the privileges of incorporation, they were formed under a special Act of Parliament.

But the great expense and ruinous delay which attended the obtaining of royal charter or special Act came to be severely felt, as the advancing prosperity of the country multiplied the number of undertakings requiring their aid, and led to the abandonment of many that would have been highly beneficial to the public and their projectors. These considerations, and the undeniable benefits which the joint-stock principle, cramped and fettered as it was by the existing state of the law, had conferred on the country, seem gradually to have liberated the Legislature from the ancient prejudices against its free operation, even though they still lingered in the tribunals.

Letters Patent Acts.

This change of sentiment was evinced by certain enactments known as the '*Letters Patent Acts*,' which may be characterized as a compromise between the old notions and the new, seeking to derive as much benefit as possible from the joint-stock principle, at the least possible concession of the privileges peculiar to corporations.

6 Geo. IV. c. 91.

The first of these enactments, 6 Geo. IV. c. 91, which virtually repealed the Bubble Act, empowered the Crown, when it should see fit, to incorporate companies by charter, without at the same time conferring on them the privilege of limited liability.

As was foreseen by all practical men, this enactment failed to meet the exigencies of the case. The difficulty and expense of obtaining charters of incorporation placed them beyond the reach of ordinary companies; and as to such larger associations as could afford to surmount these obstacles, the privilege of limited liability was precisely that of which they were most desirous, and without which mere incorporation was of little importance.

4 & 5 Will. IV. c. 94.

In 1834, the evils of the existing system again forced themselves on the attention of the Legislature, and the Act of 4 and 5 Will. IV. c. 94 was passed. This enactment rendered it competent for the Crown to confer on any joint-stock company, by letters patent, 'any privilege or privileges which, according to the rules of the common law, it would be competent to his Majesty to grant to such

company by charter of incorporation.' The chief of these privileges was declared to be that of suing and being sued in the names of officials; but from sec. 3, it would appear that limited liability was not among their number. The Act contained special provisions for making it applicable to Scotland, where, from the absence of the English technical difficulties as to suing and being sued, the privileges it offered were of little moment. It may be noticed, that in its fourth section we find the first traces of that system of registration which has since been so successfully elaborated.

This Act, like its predecessor, entirely failed to mitigate the evils complained of; and these still continuing to make themselves felt with increasing force, the Legislature once more attempted to find a remedy, and passed in 1837 the 1 Vict. c. 73, which repealed the former Acts, on the significant recital, 'that they had not been found effectual for the purposes for which they were intended.'

1837, 1 Vict. c. 73.

This, commonly known as the Letters Patent Act, extends over the United Kingdom, and is still in force. It purports to confer powers and privileges almost equal to those since made available under the Registration Acts, and for the first time contains a provision for limiting the liability of shareholders. The machinery by which its provisions are to be worked out is very similar to that of the Registration Acts, though, of course, in a cruder and less perfect form.

Notwithstanding the expectations formed of this Act, and the much more liberal spirit displayed in its provisions, it, like all its predecessors, proved a failure. The main reason of this was, that limited liability, in the proper sense of the word, could not be attained under its provisions. The shareholders still continued ultimately liable; and the only advantage secured was, that they were liable only *subsidiarie* after manifest failure of the company. The Act was accordingly little used in England, and has remained a dead letter in Scotland (*a*).

At length the old prejudices against free combination of capital gave way, and the advantages and safety of according limited liability forced themselves on the attention of the Legislature, not

(*a*) The only example appears to have been an attempt of the Western Bank to take advantage of the Act. It proved abortive.

only by the beneficial working of the foreign *sociétés en commandite*, but also by the example of such associations in Great Britain as had attained limited liability by the expensive avenues of royal charter or special Act.

These more enlarged views found expression in the statute of 18 and 19 Vict. c. 133, well known as the first Limited Liability Act. By this Act, companies were enabled to obtain all the benefits of incorporation, and (if desired) of limited liability in the full and proper sense of the phrase. It was intended, however, more as a trial than a permanent enactment, and its provisions were declared not to extend to Scotland. 18 & 19 Vict. c. 133.

This Act was no sooner in operation, than it gave great and general satisfaction, and the prognostications made by the opponents of limited liability were found to have been purely imaginary. This was so much the case, that in the following year 'The Joint-stock Companies Act, 1856' (19 and 20 Vict. c. 47), was passed, which, repealing many former Acts, and amongst others that of the previous year, re-enacted its provisions in a more perfect and consolidated form; and while rendering the benefits of incorporation and limited liability still more easily available, extended them over the whole United Kingdom. 19 & 20 Vict. c. 47.

In the following year, on the preamble 'that it is expedient that further provision be made for the incorporation and registration of joint-stock companies,' the Act 20 and 21 Vict. c. 14 was passed, by which the principles of the Act 1856 were more fully carried out; and in 1858 they were still further extended by the 21 and 22 Vict. c. 60, and by the 21 and 22 Vict. c. 91, which last enactment enabled banking companies which had hitherto been excluded from the operation of the Registration Acts, to receive the benefits of limited liability. 20 & 21 Vict. c. 14. 21 & 22 Vict. c. 60. 21 & 22 Vict. c. 91.

At length, in the year 1862, the Act 25 and 26 Vict. c. 89 was passed, known as 'The Companies Act, 1862.' By this important statute most of the previous statutes relative to joint-stock companies are repealed, and their scattered provisions are consolidated into a uniform code. The advantages of registration are brought within the reach of associations whose membership amounts only to seven persons; and numerous improvements are introduced which the experience of the working of the former Acts had suggested in 25 & 26 Vict. c. 89.

the provisions applicable to the formation, management, and winding up of companies.

WINDING-UP ACTS.

7 & 8 Vict. c. 111.

As early as the year 1844, the attention of the Legislature appears to have been called to the importance of affording greater facilities for winding up the estates of insolvent companies, and distributing their assets among their creditors, than could be obtained either by suit in Chancery or an action of count and reckoning. This led to the Act 7 and 8 Vict. c. 111.

11 & 12 Vict. c. 45. 12 & 13 Vict. c. 108.

At a subsequent period, the Winding-up Acts of 11 and 12 Vict. c. 45, and 12 and 13 Vict. c. 108, were passed, with the view of affording still further facilities for winding up insolvent companies. But experience showed that these enactments failed to produce the beneficial effects expected from their operation.

20 & 21 Vict. c. 78.

After the lapse of many years, they were amended to a certain extent by the Act 20 and 21 Vict. c. 78.

25 & 26 Vict. c. 89.

The whole of the Winding-up Acts, with the exception of the 'Railway Abandonment Act,' 13 and 14 Vict. c. 83, were, however, practically repealed by the present Companies Act of 1862, which in this as in other respects has introduced many simplifications and improvements that the experience of the working of the former Acts had suggested.

CONSOLIDATION ACTS.

Consolidation Acts.

When, for the purpose of carrying out great public undertakings, such as water-works, canals, or railways, aggressive or compulsatory powers have been required, application is in use to be made to the Legislature to incorporate the proposed company, with the necessary privileges and powers, as in this way only can they, at least in modern times, be acquired.

These applications became ultimately so numerous, that it was found desirable to pass certain general statutes which should contain all the provisions usually required by associations seeking special powers, and which, unless it were otherwise provided, should be held as forming part of the company's special Act, thus both secur-

ing greater uniformity, and obviating the necessity of continual repetition in any particular case. These statutes, known as the Consolidation Acts, were passed in the year 1845. They are in duplicate—one set applying to England, and the other to Scotland. Though differing slightly in phraseology and in practical machinery, they are identical in principle and in substance.

They consist of the following Acts :—

1. 'The Companies Clauses Consolidation Act' (8 and 9 Vict. c. 16), applicable to England; and 'The Companies Clauses Consolidation (Scotland) Act' (8 and 9 Vict. c. 17), applicable to Scotland. 2. 'The Lands Clauses Consolidation Act' (8 and 9 Vict. c. 18), applicable to England; and 'The Lands Clauses Consolidation (Scotland) Act' (8 and 9 Vict. c. 19), applicable to Scotland. 3. 'The Railway Clauses Consolidation Act' (8 and 9 Vict. c. 20), applicable to England; and 'The Railway Clauses Consolidation (Scotland) Act' (8 and 9 Vict. c. 33), applicable to Scotland.

8 & 9 Vict. c. 16, 17, 18, 19, 20, and 33.

From the sketch which has been given of the history of the law of partnership and joint-stock companies, it will be seen that as the law now stands in Scotland, such associations extend from the simple partnership or private firm up to the joint-stock company fully incorporated and invested with aggressive powers.

General view of companies.

First, there is the mere private firm, consisting of a few members, and realizing the idea of the Roman *Societas*. Next above this appears the joint-stock company unincorporated. This is still essentially an ordinary partnership; for it differs from the private firm in so far only as its more numerous membership requires some modification or adaptation of the common rules. Next in the scale appear companies formed under the Letters Patent Act, companies whose special Act does not invest them with the full privileges of corporations, and companies formed under the Registration Acts, but without attaining limited liability. Such associations may be said to stand intermediate between the unincorporated company and the proper corporation, and to approach the one or the other extreme as they possess less or more of the privileges which distinguish corporations. We then come to proper corporate bodies, including all such companies as have taken the full benefit of the Registration

Acts so as to obtain limited liability, all companies formed by royal charter, and all such as have been incorporated by Act of Parliament without restriction of the corporate privileges. Beyond this there is still a higher class, composed of companies who have not only the full privileges of corporations, but who have also certain aggressive powers in virtue of their special Acts.

Object of treatise.

The object of the present treatise is to examine the law applicable to the various forms which the partnership relation assumes in Scotland, in so far as they are applied for purposes of mercantile gain. Any allusion, therefore, which may be made to associations not having gain for their object, is merely incidental, or for the purposes of illustration.

All associations, of whatever kind they may be, which are formed for the purposes of gain, are fundamentally partnerships; and whatever peculiarities they may be intended to possess, and however numerous their membership, they will fall under the provisions of the common law applicable to ordinary firms or unincorporated companies, except in so far as in questions *inter socios* the common law has been modified by special agreement, and in so far as it has been excluded in relation to the public, by registration under the Act of 1862, by charter or letters patent, by special Act, or by this in combination with the Consolidation Acts. In short, the common unincorporated partnership or company is the type of which they are all modifications, and to which, but for the force of one or other of the above agencies, they will return.

Furthermore, though the great facilities afforded by the Act of 1862 for obtaining incorporation will undoubtedly, at no distant period, render the unincorporated common law company a thing of the past, and though there is reason to believe that further legislation in the same direction will ultimately place the benefits of registration at the disposal even of private firms, yet it is manifest that, for years to come, questions will arise out of circumstances which occurred in the former state of the law; and it is probable that, however low the benefits of registration may be brought, cases will still occur, where, through negligence on the part of members or officials, the common law will break through the barriers of statute.

For these reasons, the common law, as applied both to firms and

companies, will be fully examined and explained; and in this manner, it is hoped that the way will be paved for understanding and appreciating the machinery adopted by the Legislature, not only in the Registration Acts, but in the other modes by which incorporation may be attained.

Another circumstance in the plan of the present work must here be noticed. As has been already observed, the law of partnership in Scotland, though based on an admirable theory, has never been elaborated into a complete system. The consequence of this is, that while the equity and artistic simplicity of its principles command the admiration of the student, the practical lawyer often finds that many points of daily occurrence have not been judicially determined, and are still open to difference of opinion.

Reference to English law.

On such occasions, it has been usual to resort to the law of England, as deserving of the utmost consideration, not only as it deals with interests, customs, and a state of society so similar to our own, but also because, in consequence of the large extent and the endless variety of conditions under which the spirit of combined enterprise has manifested itself in that country, it supplies an ample store of precedents seemingly applicable to every case that may present itself.

Dangers to be avoided.

That this practice, which is becoming daily more common, is attended with great advantages, no one who gives much attention to the subject will deny, more especially as it has received the high sanction of Professor Bell, and of other writers who have undertaken to treat of Scottish partnership law. Yet the great risk of error and misapprehension that always attends the application of decisions, *dicta*, and principles found in one system of law, to questions arising in another and a very different system, must be steadily kept in view, more especially when such application is attempted to be made by the Scottish lawyer, whose legal training, while it has familiarized him with the civilians, has unhappily done nothing to acquaint him with the genius and principles of that system of law by which the greater part of the British empire is regulated.

It is true that, in so far as partnership is concerned, the decisions of the English tribunals have, in the great mass of cases, been in accordance with equity, and with that practical good sense which was to be expected from a great mercantile community; so that

they must be law in any country where the partnership relation is properly understood, and equal justice is sought to be administered. But, on the other hand, it must not be forgotten, as it is very fairly admitted by the English authorities (*a*), that in one or two branches of partnership law, the original imperfection of the theory, coupled with the unbending nature of the technical rules of pleading adopted in England, has led to results so plainly unjust and intolerable, as to require legislative interference. And it is also very evident that, from the division of the English tribunals into separate courts of law and equity, any one not conversant with that system is apt to mistake the ruling in a particular case for the exponent of a principle of abstract justice, when in truth it is nothing more than a consequence of the suitor having sought his remedy in a court whose limited jurisdiction or mode of procedure did not permit it to deal with the question in its entirety. Furthermore, it is observable that even in that great mass of cases where the judgments of the English tribunals are plainly in accordance with abstract justice and sound polity, it not unfrequently happens that the *media concludendi*, in consequence of their assuming a highly technical form, are more apt to mislead than to guide when applied to cases in Scottish practice seemingly analogous.

Rules suggested.

These considerations suggest the following rules as necessary to be kept in mind when English authorities are had recourse to in order to elucidate the law of partnership in Scotland. All English decisions, dicta, and principles, which are ostensibly based on abstract justice or sound commercial polity, may be safely followed as precedents; but all such as are either founded on or are mixed up with technicalities, are to be distrusted, as of very doubtful authority in the Scottish system. English decisions are safe precedents when the circumstances of the case are substantially identical, but must be received with great caution when they are merely analogous. In considering the value of an English decision as indicative of a principle, regard must always be had to whether it has been given in equity or at common law, as in the latter case it may be the exponent of a mere technicality; and also as to whether it is not to be explained as the consequence of a rule in some other branch of English law, and peculiar to that system. Lastly, English

(*a*) Lindly, Collyer, Thring.

decisions are in the most favourable circumstances to be regarded merely as valuable guides, not as authorities absolutely fixing the law in Scotland.

These observations are intended to apply to partnerships or companies existing only at common law; the case is different with such associations as are formed in virtue of laws which are general over the kingdom,—as, for example, companies governed by the Registration Acts. In such cases, where the law is the same, the constituted tribunals must be presumed equally capable of giving a sound interpretation whether they sit in London or Edinburgh, unless, indeed, it can be shown that the force of statute has failed totally to exclude the pressure of the respective common laws. When, therefore, there is no reason to suspect the presence of this latter element, English and Scottish decisions should be deemed of equal authority.

Cases where the law is similar but not the same.

There is also another class of joint-stock companies in relation to which the law is extremely similar, and yet not quite identical, in England and Scotland. The Scottish Consolidation Acts are for the most part mere transcripts of those previously framed for England, and differ from them in little more than was necessary to enable the intentions of the Legislature to be worked out by the existing machinery of the law of Scotland. In like manner, companies formed under royal charter or letters patent, in Scotland and England respectively, differ from each other in such respects only as may be due to a difference (if there be any such) in the privileges conferred by these writs on opposite sides of the Tweed, or to the operation of the common law in other respects, where not entirely excluded. In these and the like cases the English authorities will generally be found trustworthy guides, except in so far as the circumstances referred to can be traced in operation.

Cases where the law is the same in both countries.

Impressed with these considerations, we have not hesitated throughout this work to make a liberal use of English decisions, and have frequently referred to English writers not only where our own authorities were silent or doubtful, but where there was reason to believe that the subject in hand would thus receive fuller illustration. In doing this we have endeavoured to mark the distinctions in principle or theory between the two systems, to separate the equitable from the mere technical rule, and thus to distinguish

cases which are precedents merely in appearance, from such as are based on principles that must hold good in all systems of jurisprudence, or are identical in Scottish and English law. Well knowing, however, that the most laborious efforts will not in a field of this extent and intricacy afford an absolute guarantee against error and misconception, we have been careful in all cases to note the decisions and authorities from which we have deduced our views, thus putting it in the power of the practitioner to verify for himself the accuracy of the statement in the text. As it has been our endeavour to refer to *all* the authorities on the subject in hand which could be found in the law of Scotland, and as we have often referred to a great number in English law when such illustration seemed advisable, we have sought to state the doctrine or deduction in the text in as succinct a manner as possible, and have, as far as we could, avoided the practice of lengthened quotations, which, while they swell the letterpress, may generally be read to advantage only in the context out of which they are taken.

BOOK I.

CONSTITUTION OF SOCIETY.

CHAPTER I.

FOR WHAT PURPOSES SOCIETY MAY BE CONSTITUTED, AND WHAT PARTNERSHIPS OR COMPANIES ARE ILLEGAL.

EVERY undertaking in which an individual may lawfully embark, may competently be followed out by an association of individuals; and such associations may assume the forms of private firms, companies, joint-stock companies, or corporate bodies, except in so far as the statutory law has otherwise determined.

Associations contrary to morality, etc.

All associations, of whatever nature they may be, which have for their object an undertaking or line of business forbidden by the current notions of morality, religion, or public policy, are illegal; and the law, apart from punishing the promoters or members, will hold their acts to be nullities. As examples of this may be instanced associations formed for the purposes of overturning the established religion (*a*), subverting the constitution, or trafficking in the sale of public offices; or established with the view of making gain by what is morally a crime, *e.g.* robbery, theft, prostitution, etc.; or of what is incompatible with social well-being, *e.g.* procuring marriages (*b*).

Associations in breach of statute.

And the same rules apply to associations having for their object

(*a*) *Pare* v. *Clegg*, 29 Beav. 589; *Thornton* v. *Howe*, 8 E. Jur. N. S. 663.

(*b*) *Thomson* v. *M'Kailie*, 14 Feb. 1770, F. C.; *Sterry* v. *Clifton*, 9 C. B. 110, 1 Bell's Com. 298, Levi's Com. Law i. 48, Lindley 137; *Stewart* v. *Gibson*, 1835, 14 S. 166, H. L. 1838, 1 Rob. 260; *Everet* v. *Williams*, reported in Pothier on Obligations, by Evans, ii. p. 3, n.

violations of the revenue laws, or indeed of any special enactments forbidding what otherwise would not be illegal (*a*).

Associations contrary to the public interest.

In an old case, a society of wool-combers was found to be illegal, in respect that its regulations tended to cramp trade, and make the members independent of their employers. As combinations among workmen are no longer illegal, this decision has ceased to be a precedent to that effect; but the principles it recognises would still be given effect to, in the case of any association directly leading to a breach of the peace, or plainly inconsistent with order and existing law (*b*). On the same grounds, a contract of copartnery between a town and country agent, by which it appeared the interests of the public might be sacrificed, has been found illegal, and action upon it refused (*c*).

Illegality must inhere in the purposes of association.

It must be observed, however, that the commission of particular acts of illegality, though it may *quoad* these acts infer nullity, besides subjecting the individual shareholders or partners in penalties, does not render the association illegal so as to put it beyond the protection of the law. To produce this effect, the illegality must inhere in the purpose of the company's formation, so that its very existence infers an infringement of law (*d*).

Mala in se and *mala prohibita.*

At one time a distinction was attempted to be made in England between *mala in se* and *mala prohibita*, as though the former only inferred nullity, and the latter not, at least as between partners (*e*). This doctrine has, however, been long abandoned; and it is now clearly fixed, that in either case absolute nullity is the consequence of a contract of copartnery to infringe the law of the land (*f*).

Difference between prohibitory and directory provisions.

But in determining whether a copartnery is illegal by reason of a particular statute, a distinction is made (at least in England) between provisions which are strictly prohibitory, and such as are merely directory. It has been held, for instance, in that country,

(*a*) See examples of this as to the Pawnbroking Acts, *Gordon* v. *Howden*, as revd. 1845, 4 Bell 254, 17 Jur. 329; *Fraser* v. *Hair*, 1848, 10 D. 1402; and 1852, 14 D. 335. See 1 Bell's Com. 301 *et seq.*

(*b*) *Procurator-fiscal* v. *Woolcombers of Aberdeen*, 1762, M. 1961.

(*c*) *Gilfillan* v. *Henderson*, 1832, 10 S. 523; *Brashe*, March 9, 1820, F. C.

(*d*) See previous cases. See Collyer on Partner. pp. 32 *et seq.*; and Lindley on Partner. p. 136.

(*e*) *Watts* v. *Brooks*, 3 Ves. 611; *Petrie* v. *Hannay*, 3 T. R. 418.

(*f*) See Park Insur. 497; *Aubert* v. *Maze*, 2 Bos. and P. 571. See Coll. 32; *Knowles* v. *Haughton*, 11 Ves. 168.

that omission to comply with an Act of Parliament whose direct object is *not* the protection of the public, does not render the co-partnery illegal, so as to deprive the partners of their right to recover on a contract with third parties. Thus it was held that a firm of distillers was not illegal, though one of them carried on business as a retail dealer in spirits within two miles of the distillery (contrary to 4 Geo. IV. c. 94, ss. 132–3), and was not registered as one of the firm in the Excise books (in terms of 6 Geo. IV. c. 81, s. 7). Here the firm had sued a third party as a guarantee; and the defence was, that as the whole trading of the plaintiffs was illegal, they could not recover. Judgment was for the plaintiffs; and the opinion of Lord Tenterden is so instructive, that part of it may here be quoted (*a*). Referring to the cases of *Hodgson* v. *Temple* and *Johnson* v. *Hudson* (*b*), his Lordship said: 'These cases are very different from those where the provisions of Acts of Parliament have had for their object the protection of the public, such as the Act against stock-jobbing, and the Acts against usury. It is different also from the cases where a sale of bricks, required by Act of Parliament to be of a certain size, was held to be void because they were under that size. There the Act of Parliament operated as a protection to the public as well as to the revenue, securing to them bricks of the particular dimensions. Here the clauses of the Act of Parliament had not for their object to protect the public, but the revenue only.'

Case of dormant partners.

It must also be observed, that as regards such statutes as require certain businesses or trades to be carried on by duly qualified persons, and no others, their provisions do not strike against partnerships with dormant partners unqualified, so long as the active partners are within the requirements (*c*).

Associations declared illegal, etc., by Act 1862.

By the existing Registration Act (1862), the following associations are declared illegal:—

1. All unregistered banking companies composed of more than ten persons, formed on or after the 2d November 1862, unless under Act of Parliament or Letters Patent (*d*). 2. All partner-

(*a*) *Brown* v. *Duncan*, 10 B. and C. 93. See also *Smith* v. *Mawhood*, 14 M. and W. 452.

(*b*) 5 Taunt. 181; 11 East 180.

(*c*) *Candler* v. *Candler*, Jac. 225; *Raynard* v. *Chase*, 1 Burr. 2.

(*d*) Sec. 4.

ship, associations, or companies unregistered and composed of more than twenty persons, formed on or after the 2d November 1862, for the purposes of gain, unless they are under Act of Parliament or Letters Patent (*a*).

The consequences of non-registration in these two cases appear to be not merely illegality, but simple nullity.

It is further provided, that all companies or associations which ought to have registered under the previous Acts, 1856, 1857, and 1858, and failed so to do, shall register under the present Act (*b*). Yet such as do not comply with this requisition are not, it would appear, illegal, but incur the following consequences, which are, in most cases, tantamount to illegality :—

1. They are rendered incapable of suing, but still remain capable of being sued. 2. No dividend is payable to any of their members. 3. Every manager or director of the company is liable to a penalty of £5 per day (*c*).

Associations usurping privileges of corporations.

It appears at one time to have been held in England, that at common law, and independently of the Bubble Act, all associations were illegal which, without being incorporated by proper authority, presumed to usurp the functions of a corporate body, such as raising or pretending to raise transferable stock, making bye-laws, having a committee of management, holding general meetings, etc. (*d*). This view, however, has since been abandoned, especially since the repeal of the Bubble Act (*e*). In Scotland it does not appear that any such notion was ever entertained; and even while the '*Bubble Act*' remained in force, the courts exhibited great unwillingness to give effect to its prohibitory enactments (*f*). If an incorporated joint-stock company were to attempt to exercise any of the more characteristic and important *naturalia* of a corporation,—*e.g.* using a common seal, suing or defending in a descriptive or seemingly corporate name, claiming limited liability, and the like,—the association would not thereby become illegal to

(*a*) Sec. 4.

(*b*) Sec. 209.

(*c*) Sec. 210.

(*d*) *Josephs* v. *Pebrer*, 3 B. and C. 639; *Duvergier* v. *Fellows*, 5 Bing. 248; *Kinder* v. *Taylor*, Coll. 73; *Blundell* v. *Winsor*, 8 Sim. 601.

(*e*) See 6 Man. and Gr. 107, *per* L. C. J. *Walburn* v. *Ingilby*, 1 M. and K. 61; *Garrard* v. *Hardy*, 5 Man. and Gr. 81.

(*f*) *Stevenson and Co.*, M. 14560 (1757); *Macandrew*, 6 S. 950 (1828).

the effect of terminating its existence, or subjecting its members to pains and penalties; but all its acts done in usurpation of the privileges of a corporate body would be mere nullities.

Such questions are now, however, more matter of curiosity than of practical importance, as the Registration Act of 1862 has brought the benefits of incorporation within the reach of any copartnery which bears the semblance of a joint-stock company.

CHAPTER II.

WHO ARE CAPABLE OF CONTRACTING AND SUSTAINING THE SOCIETY RELATION.

In considering this matter, a distinction must be made between private partnerships or firms, when there is *delectus personæ*, and public companies whose shares are transferable, and whose management is committed to officials. The consequences to which this distinction gives rise will be pointed out in the present chapter.

In general, it may be stated that any person may be a partner or shareholder who is capable of giving consent, and who is not otherwise disqualified by law.

It must be observed, however, that mere inability to give consent does not *eo ipso* disqualify one from forming or continuing the partnership relation in all cases; sometimes its only effect is to make it less binding. We shall treat of the consequences of inability to give consent under the following heads, viz. Minority, Coverture, and Lunacy.

Pupils.

Minority.—As by the law of Scotland a pupil is incapable of giving consent, and as guardians have no implied power to invest the property of their wards in trading speculations, it may be taken as the general rule, that a pupil cannot be made the member of a trading concern by the act of his guardians, or even of his father as his legal administrator (*a*). In *M'Aulay* v. *Renny*, a man who had signed a contract of partnership for his son, a boy of eleven years of age, in a company that traded for three years and then was sequestrated, was held to have made himself a partner instead of his pupil son, who was incapable of entering into the contract (*b*). A similar judgment was given in the case of *Calder* v. *Downie* (*c*),

(*a*) 2 Bell's Com. 624.
(*b*) 1803, 2 Bell's Com. 624, n. 5.
(*c*) 1811, 16 F. C. 390; aff. 1815, 18 F. C. 508, 2 Bell's Com. 625, n.

where the pupil was ten years of age; and in *Pettigrew Wilson's* case (*a*), where guardians had engaged their ward, a boy aged fourteen, in a coal partnership.

It has been usual to quote these decisions, as establishing the doctrine that parents or guardians who engage pupils as partners, become in every case liable to the company as their substitutes or sureties. But it is very doubtful if this be a correct statement of the law of Scotland (*b*).

English rules.

In England the law seems to stand thus: A father or guardian may engage an infant as a partner, without incurring any responsibility as a partner himself, provided he receive no advantage or emolument from the transaction, is not in receipt of any of the profits in trust for the infant, and has not induced the company to receive the infant by fraudulent representations, or by holding out his own responsibility (*c*). But, on the other hand, if he transfer shares from his own name to that of the infant, in order to avoid responsibility, or even in *bona fide*, at a time when the company is insolvent, the transfer will be held null, and the father or guardian will still remain liable to be made a contributory (*d*).

These rules appear extremely equitable in themselves, and seem to be the true exponent of the Scotch cases referred to above, in so far as the latter can be taken as precedents, encumbered as they are with specialties, and only imperfectly reported.

Minors.

Minors, strictly so called, may become shareholders or partners with consent of their curators, and if not so protected, by their own act; and this on the general principle, that minors, with or without curators, are entitled to the management of their estate. But whether they have guardians or not, they are entitled to get rid of this, as of other obligations contracted in minority, by action of reduction on the head of minority and lesion, brought within the *Quadriennium Utile* (*e*).

(*a*) 1796. Referred to, Sess. Pa. *Calder* v. *Downie*, *supra*, and in 2 Bell's Com. 624.

(*b*) Menzies' Lect. 421.

(*c*) Collyer 8; *Barklie* v. *Scott*, 1 Huds. and Bro. 83; *ex parte Maxwell*, 24 Beav. 321.

(*d*) *Reaveley's* case, 1 De G. and S. 550, and 12 E. Jur. 1065; *Stikeman* v. *Dawson*, 4 Rail. Cas. 585; *ex parte Lichfield*, 3 De G. and S. 141; *ex parte Reid*, 24 Beav. 318; *Hennessy's Exrs.*, 3 De G. and S. 191, and 2 Mac. and G. 201; *Pim's* case, 1 Mac. and G. 291.

(*e*) Ersk. i. 7, 33; *Dennistoun* v. *Mudie*, 1850, 12 D. 613.

But to succeed in this action, the pursuer must prove, 1. That he was really minor at the time he became a shareholder, and that he was induced to become so through weakness on his own part, or imprudence or negligence on that of his curators; 2. That he is seriously injured by the transaction; for if the injury be of a trifling or doubtful kind, the remedy is excluded (*a*). Fraud on the part of a minor deprives him of this relief—*e.g.* if he should obtain shares in a company by representing himself to be major (*b*).

Avoiding of contract.

A contract of copartnery entered into with a pupil, or with a minor having curators, and without their consent, may be avoided by the minor when he comes of age by his simple repudiation, and does not require to be set aside by reduction, being in one sense a nullity from the beginning (*c*). He will also be entitled to recover any contributions he may have made during the time it was supposed to exist (*d*); but from favour to commerce, this claim of restitution would seem to be excluded, where the minor has profited by the transaction, and it is no longer possible to restore matters *in integrum* (*e*).

Election to repudiate or abide by the contract.

It must be observed, however, that the contract of partnership, like other contracts entered into with minors, is a nullity only if the minor chooses to regard it as such. He may on coming of age elect to continue it and hold it as good, and in such a case the other contracting parties remain bound.

But whichever alternative he chooses to adopt, he must accept it with all its consequences,—that is to say, he must either repudiate his connection with the company altogether, in which case he will renounce alike liability and profit; or else he must abide by the company, in which case he will share risks as well as gains, according to the maxim, *Qui sentit commodum sentire debet et onus.* This doctrine has been repeatedly given effect to in England (*f*); and although the pure question does not seem hitherto to have emerged

(*a*) Ersk. i. 7, 36.

(*b*) *Wilkie* v. *Dunlop*, 1834, 12 S. 506; *Dennistoun* v. *Mudie*, *supra*, and cases there referred to; *Wright* v. *Snqwe*, 2 De G. and S. 321; *ex parte Watson*, 16 Ves. 265.

(*c*) Ersk. i. 7, 34; but see *Waddell* v. *Gibson*, 18 Jan. 1812, 16 F. C. 473.

(*d*) Ersk. i. 7, 41; *Corpe* v. *Overton*, 10 Bing. 253.

(*e*) Ersk. i. 7, 41; *Holmes* v. *Blogg*, 8 Taunt. 508; *ex parte Taylor*, 2 E. Jur. N. S. 220, 8 De G. M'N. and G. 254.

(*f*) *North-West. R. Co.*, 5 Ex. 114; *Leeds and Thirsk R. Co.*, 4 Ex. 26; *The Birkenhead and Lancashire R. Co.*, 5 Ex. 24. See Lindley, p. 75.

in this country, there can be no doubt that the law would be held to be the same on the well-known principle of '*Approbate and Reprobate.*'

Repudiation, to be effectual, must be unequivocal.

Furthermore, if a minor on attaining majority elect to repudiate the contract, he must do so unequivocally. Any act on his part, even during the *quadriennium utile*, plainly inferring homologation, *e.g.* payment of calls, sharing profits, signing name of firm, etc., ought to bar subsequent repudiation, unless it can be shown that such acts were done under evident misconception of their import. This has been frequently decided in England (*a*), and from analogous cases there can be no doubt that the law of Scotland is the same (*b*).

Coverture.

Coverture.—At common law, all deeds done or contracts entered into by a married woman without her husband's consent are null and void. But this general rule is subject to divers exceptions.

1. A married woman's personal obligations receive effect during a legal or voluntary separation from her husband, or when he is abroad (*c*).

2. Her obligations hold good as to all property in relation to which her husband has renounced his *jus mariti* and *jus administrationis*. And,

3. Her obligations are good as to any estate conveyed to her under exclusion of her husband's curatorial power.

In all cases other than such as fall under these exceptions, it should seem that a married woman cannot become a partner or shareholder without her husband's concurrence, which if he gives, he must virtually be looked upon as the responsible party.

Consequences of marriage in private firms;

In private partnerships where there is *delectus personæ*, if a single woman who is a partner marry, her marriage, which would have the effect of substituting her husband in her place, operates as a dissolution of the partnership relation, unless the copartners agree to accept of her husband as partner (*d*). In public companies where there is no *delectus personæ*, the concern being managed

in public companies.

(*a*) *Goode* v. *Harrison*, 5 B. and A. 147; *Holt* v. *Ward*, Str. 937; *Cork and Bandon Railway Co.*, 10 Q. B. 935; Lindley, p. 76; Coll. 8.

(*b*) *Forrest* v. *Campbell*, 1853, 16 D. 16.

(*c*) *Churnside*, 1789, M. 6082; *Orme*, 1833, 12 S. 149. See also the Conjugal Rights (Scotland) Amendment Act, 1861.

(*d*) *Nerot* v. *Burnand*, 4 Russ. 247.

by officials, and the shares being transferable, the marriage of a female shareholder does not terminate the partnership relation, though it may operate as a transfer of shares to the husband.

It may here be observed, that a married woman, though possessed of separate estate, cannot validly enter into a contract of partnership with her husband (*a*).

Lunacy.

Lunacy.—As regards this disqualification, a distinction must be taken between lunacy preceding, and lunacy supervening on, the contract of partnership; and a difference must also be made between private firms and public associations.

We shall first consider the case of private firms or partnerships.

In the case of private firms.

A lunatic cannot enter into a contract of partnership, because he is not capable of giving the consent necessary to found that relation. But this rule would seem subject to the equitable exception, that if one contracts with a lunatic *bona fide* and in ignorance of this incapacity, and if by reason of *rei interventus* it has become no longer possible to restore matters *in integrum*, the contract will not be held to be a nullity so as to set the lunatic free from the liabilities he has thereby incurred, previous to the time when the other partner was made aware of the lunacy (*b*).

Supervening lunacy.

If, during the subsistence of a partnership, one of the partners becomes lunatic, this does not seem of itself to operate a dissolution. But if, on application to the Court, it appears that the lunacy is incurable, and the partnership is such as to require contributions of skill and industry, a dissolution will probably be decreed (*c*).

Until, however, the partnership is dissolved, the lunatic is entitled to share the profits with his copartners, and is liable for the consequence of their acts (*d*).

Public companies.

In the case of public associations or joint-stock companies proper, a lunatic can neither become a subscriber for, nor a purchaser of shares, if his lunacy be known, because he is plainly

(*a*) *Per* Lord Ivory in *Macara* v. *Wilson*, 1848, 10 D. 707.

(*b*) *Molton* v. *Camroux*, 2 Ex. 487; *Beavan* v. *M'Connell*, 9 Ex. 309; *Pollock* v. *Paterson*, 1811, 16 F. C. 369; *Spence*, 1812, 16 F. C. 727, 1 Bell's Com. 489, n. 2. See also *Baxter* v. *Earl of Portsmouth*, 5 B. and C. 170.

(*c*) *Jones* v. *Noy*, 2 Myl. and Kee. 125; *Wrexham* v. *Huddlestone*, 1 Swanston 514, n.; *Waters* v. *Taylor*, 2 Ves. and Bea. 299.

(*d*) *Sadler* v. *Lee*, 6 Beav. 324; *Jones* v. *Noy*, *supra*.

incapable of consent. As, however, there is no *delectus personæ* in such associations, there is nothing to prevent him becoming a legatee of shares. In such a case, it would only in special circumstances seem to be the duty of his curator to repudiate the legacy, though it would unquestionably be proper to realize without delay. It need hardly be observed, that a lunatic shareholder continues liable for the obligations, and entitled to the dividends attaching to his shares, until by sale or otherwise he ceases to be their holder.

Aliens.

Some persons, though otherwise capable, are prevented by law from becoming partners or shareholders in this country. Among these, aliens may be specially referred to.

An *alien ami*, *i.e.* the subject of a foreign state at peace with Great Britain, since he can sue actions relating to moveables, may be a partner or shareholder in a British company (*a*). But an *alien enemy*,—that is, the subject of a foreign state at war with this country,—having no right of action either directly or by trustee, is much more unfavourably situated (*b*). What determines questions of this kind is not so much the element of nationality, as the ability or inability of the party to prosecute his claims in this country. Hence an *alien enemy*, who was resident in this country, and had contracted the partnership relation before the outbreak of hostilities, and who still continued to reside here, does not lose his partnership rights (*c*); and a British subject who happens to be detained in a foreign country at war with Great Britain, though he does not thereby lose his right to call his copartners to account, may have to postpone its exercise till the return of peace (*d*). So also a foreigner resident abroad, and holding shares in this country before the declaration of war with the country in which he is resident, does not thereby necessarily incur forfeiture of their proceeds, but must await the return of peace to make good his claim (*e*). Whether the supervention of war in such cases terminates the partnership

(*a*) *Macao* v. *Officers of State*, 1822, 1 S. App. 138. See *M'Connell* v. *Hector*, 3 B. and P. 113; Collyer, p. 9; and Lindley, p. 79.

(*b*) *Arnauld* v. *Boick*, 1704, M. 10159; *Carron* v. *Cowan and Co.*, 28 Nov. 1809, 15 F. C. 435.

(*c*) *Wells* v. *Williams*, 1 Salk. 46; *Aitkens* v. *Crawford*, *etc.*, 10 June 1813, 17 F. C. 361.

(*d*) See same cases.

(*e*) *Ibid.*; and see *Arnauld* v. *Boick*, *supra*, and *Carron* v. *Cowan*, *supra*.

relation as from that date, depends on whether the partner is resident in the enemy's country, and whether the contract requires him to take a more active part in the concern than is compatible with such residence.

These are submitted as the general results of the authorities on this subject in English and Scottish law. But it must be admitted that the decisions are not always very clear, nor always easy to reconcile with each other. The tendency of the older jurists was to the rigorous exclusion of all commercial intercourse between the subjects of states at war with each other; the milder views of later times are, it is to be hoped, inaugurating a wiser policy. As the subject is of considerable consequence, a list of the more important English cases and authorities is appended (*a*).

Not only may individuals become members of partnerships or companies, but artificial persons, viz. corporations, common law companies, and even private partnerships. This sometimes raises difficult questions with creditors, which will be afterwards noticed (*b*).

In England, corporations alone can become partners; common law companies and private firms being excluded, by reason of the English law not recognising a *quasi persona* in such associations (*c*).

(*a*) Collyer, p. 9; Lindley, p. 79; Addison on Contracts, 934; *Evans* v. *Richardson*, 3 Mer. 469; *Griswold* v. *Waddington*, 15 John. 57, and 16 John. 438; *O'Mealy* v. *Wilson*, 1 Camp. 482; *ex parte Baglehole*, 18 Ves. 525; *Willison* v. *Pattison*, 7 Taunt. 440.

(*b*) 2 Bell's Com. 625.

(*c*) Grant on Corporations, p. 5; Lindley 78.

CHAPTER III.

OF PARTNERSHIPS AND CORPORATIONS, AND THEIR DIFFERENTIAL CHARACTERISTICS.

THE principle of society or association for the purposes of gain assumes in Scotland, as already mentioned, various forms. But among these, two types can be plainly distinguished, to which all the others stand in the relation of intermediate or improved varieties, specialized or adapted for particular purposes. These are the mere private partnership on the one hand, and the proper corporation on the other. It is very probable, indeed, that the former is the original type, of which the latter is only a highly improved species. Yet the differential characteristics of both, though less broadly marked in this country than in England, have never been confounded from the remotest period at which we have any traces of the Scottish law of society. A mere firm has always been one thing, and a true corporation another; and notwithstanding the existence of numerous intermediate varieties, none have ever been permitted to assume the characters of the corporation without the sanction of public authority.

Types of association.

The importance of obtaining clear conceptions of these two primary types of commercial associations, not only as they are in themselves, but as they differ from each other, will become more apparent as the work advances; but it may be sufficient at the outset to instance the following considerations. Questions of difficulty as to the management of companies, and the powers and liabilities of the members, whether *inter sese* or in questions with the public, often admit of an easy solution, when it is once settled whether the radical type of the society is a partnership or a corporation. But as the superficial appearance of the former often presents in Scotland a delusive similarity to the realities of the latter, it becomes all the

Importance of distinction between partnership and corporation.

more necessary to have the fundamental characteristics sharply defined. There is also reason to believe that the want of clear notions on this subject has deprived the Scottish lawyer of much valuable light which English law would have cast on his own system, or has even converted that light into a source of confusion and error.

The remainder of the present chapter will accordingly be occupied with an examination of the leading characteristics of these two types of association.

PRIVATE PARTNERSHIP.

It is always difficult, and often dangerous, to give rigid definitions of legal terms; and even when the definition is open to no other objection, it is generally found to be of little practical utility. Numerous definitions have been given of partnership, many of which are remarkable for their elegance and apparent simplicity; few or none for elucidating the nature and effects of the contract. Without attempting to define, we shall endeavour to describe as briefly as possible the nature of the relation as it is understood in the law of Scotland.

General description of partnership.

Partnership is a voluntary association of two (*a*) or more persons to carry on some lawful business or undertaking for purposes of mercantile gain. All the members are bound to further the interests of the association to the best of their ability, and all of them are in the general case required to contribute goods, money, skill, or industry. The partnership itself forms a *quasi persona* in law, so that it may contract the relations of debtor and creditor, not only with the world, but with its own members. Within the sphere of its line of business its members are its implied agents, and they stand to the public as sureties for its debts; so that as soon as these have been duly constituted, the members may be proceeded against *singuli in solidum* to the utmost of their means and estate. Among themselves they are always entitled to some share of the profit, and are liable for some part of the loss; but the proportions are regulated by the terms of the agreement.

(*a*) *Nairn* v. *Sir Will. Forbes and Co.*, 1795, 2 Bell's Com. 625, n. 1; *Reid* v. *Chalmers*, 1828, 6 S. 1120.

Scottish theory of partnership.

The distinctive or central feature of the Scottish partnership is that it constitutes a *quasi persona*, of which the members are agents and sureties,—a principle which exactly realizes the notion of a firm entertained by mercantile men both in this country and in England. This principle has everything to recommend it on the score of simplicity and convenience; and it has accordingly been adopted by the Legislature in the English and British Registration Acts, of which it forms the basis and theory.

English theory of partnership.

While this is the Scottish theory of a partnership, that adopted in the law of England is entirely different. According to that system, the firm has no existence separate from the units of which it is at any given time composed. Hence it can neither possess rights nor incur obligations distinct from those of its members; nor can the relations of debtor and creditor subsist between it and them. In suits by or against the firm, all the partners must be made plaintiffs or defendants; and as this requirement cannot be complied with in actions between the firm and its members, it has often been found that justice could only be obtained by dissolution.

Consequences of English theory.

These consequences of the non-recognition of the *quasi* person of the firm have, it is true, been somewhat modified in later times by courts of equity and bankruptcy; but they have always been rigidly enforced at common law, and so pervade the English system as to render the Scottish lawyer justly suspicious of any decision in which it is possible they may have formed an element.

Difference between partnerships and corporations.

But while the law of Scotland recognises a distinct *quasi* person in a private copartnery, it is careful not to confound this legal abstraction with the proper person of a corporation. Hence a private copartnery, however large, is no more entitled by the law of Scotland than by that of England to hold property, to act or transact, or to sue or be sued in a corporate name; but in these and similar cases, the names of some, though not generally all, of the partners must appear in conjunction with, or as forming part of, the name of the *quasi* person,—thus exhibiting the individuality of the partners as well as the aggregation of the firm.

Dissolution of partnerships.

As partnerships are created by the mere will of their members, they are dependent on that will for their continued existence, and do not, like corporations, possess the element of endless duration.

CORPORATIONS.

General observations.

These associations, being the creations not of private will but of public authority, fall to be regulated rather by the constitutional laws of the empire than by the systems of private or municipal law. When they are the creatures of statute, they possess any privileges amounting to aggression or monopoly which the Legislature, in the plenitude of its power, may choose to confer; nor can these be in any respect limited by the usages of the common law. When, again, they owe their origin to prerogative, the rights and privileges they enjoy can never exceed what the principles of the constitution empower the Crown to confer.

In considering, therefore, the law of corporations, a distinction must be made between the practice of remoter times, and what must be held to be law since the constitution has settled into its existing form. Corporations may, it is true, continue to enjoy privileges of the most invidious nature conferred on them by competent authority in remote ages, until deprived of them by Act of Parliament; but when it is asked what privileges can now be conferred otherwise than by the Legislature, regard must be had simply to the existing state of the constitution, and precedents prior to the Revolution are of no importance whatever.

Similarity of English and Scotch law.

These considerations lead to the inference that, apart from special legislation, the existing law of corporations is at the present day substantially the same in Scotland as in England. Exclusive privileges, aggressive powers, the right of framing bye-laws binding on the public, and even what are termed the *naturalia* of a corporation, have all a tendency to affect more or less directly the liberty of the subject, or the general rights of the community. Now it cannot be supposed, *a priori*, that the law regulating the creation or management of associations vested with rights and privileges of this kind should differ in England and Scotland. Such an assumption would infer a difference in constitutional law; and therefore we may reasonably conclude, that whatever anomalies the old law of Scotland might exhibit in this respect prior to the Union, they have long since ceased to exist either by disuse or by legislative action.

Similarity of history.

The substantial identity of the English and Scottish law of corporations is strongly evidenced by their respective histories. Both may be traced back to a period when the laws of the two countries were extremely similar (*a*). In both, corporations could originally be erected only by the Legislature, or, within certain limits, by the royal authority (*b*). In both, this power came to be assumed by powerful subjects, as feudalism culminated in the appearance of extensive palatinates (*c*). In both, the Sovereign made similar attempts to do by prerogative what could only be done by Act of Parliament—investing corporations with monopolies and exclusive privileges (*d*); authorizing individuals or corporations to erect other corporations (*e*); empowering corporations to make bye-laws, binding not only on their own members, but on the public (*f*). In both, these irregularities and usurpations came ultimately to be resisted, and were brought to an end either by legislative action, or by the silent but resistless pressure of constitutional government. In Scotland, their disappearance was slower and less marked, because the shade of a despotic government, which received its death-blow at the Union, still continued to haunt our tribunals to a much later period.

Scotch authorities.

The principles of corporation law have never in Scotland been elaborated by the same endless variety of application, nor sifted with the same minute accuracy of research, as in England. Hence the existing materials available for ascertaining the Scottish law on this subject are far more meagre than could be desired; and much remains in this country shadowy and indistinct, which has long since in England assumed clearness and precision, by the assiduity

(*a*) Regiam Maj. Quoniam Attachiamenta; Ersk. i. 1, 33.

(*b*) Year-B. 49 Edw. III. fol. 4, *per* Candish, J.; Com. Dig. Franchise, F. 2; Madox Firma. Burg. 26; Ersk. i. 7, 64.

(*c*) Erections of corporate bodies by Lords of Regality, Ersk. i. 4, 30; and by Lords of Palatinate, *vid.* 1 T. R. 582; and *Goodyer* v. *Shaw*, Styl. 298. See Grant on Corp. pp. 11 *et seq.*; see also First Report of Corporation Com. App. 1511.

(*d*) See stat. 1641, c. 76; 1 Bell's Com. 109; Grant on Corp. 34.

(*e*) '*Seals of Cause*,' Ersk. i. 7, 64, Ivory's note; Bell's Prin. s. 2183; Ross's Bell's Dict. 744; Grant on Corp. 12.

(*f*) See *University of Glasgow* v. *Physicians and Surgeons*, 1840, 1 Rob. App. 397; Grant on Corp. 76–7.

of the tribunals in working out and applying the maxims of the constitutional law. Yet the few and scattered *dicta* of our institutional writers, coupled with the decisions in reported cases, can leave no doubt in the mind of the impartial inquirer, that, as might be expected, the outline and general principles and spirit of the Scottish and English systems are identical. In unimportant details, in technical phraseology, in manner of remedy, differences of course present themselves. But in all other respects they seem to differ no further than any two systems will differ, where, principles and spirit being identical, the one has carried them out by logical sequence to their necessary results in an immense variety of practical details, while the other, labouring in a more circumscribed field, has hitherto left much of this process unaccomplished.

Mercantile corporations.

These observations apply principally to corporations aggregate; and are more especially applicable to corporations of this kind formed for the purposes of gain, which alone fall within the limits of this treatise. When understood with these limitations, their accuracy would seem well established; for whatever differences may be conceived to exist between the English and Scottish laws as applicable to corporations erected for municipal, legal, scholastic, or social purposes, no differences seem discoverable in the law applicable to incorporated joint-stock companies beyond technical details, phraseology, or modes of remedy.

Creation of corporations.

A corporation is a body politic created by public authority for special purposes, and endued with certain capacities, in virtue of which it is in contemplation of law a proper person, capable in many respects of willing and acting like an individual.

Royal charter and special act.

In modern times, corporations can be constituted in one of two ways only,—viz. by charter from the Crown, or by Act of Parliament. Formerly, both in England and Scotland, the Crown was in use to delegate its powers to certain of the nobility to erect corporations; but this practice, as being obviously incompatible with public policy, has long since been abandoned. It was also usual to empower royal burghs, universities, and the like, in their charters of erection, to constitute subordinate corporations. This in Scotland was done by a '*seal of cause*.' But for similar reasons this custom has long since gone into complete desuetude, and could not

Seals of cause.

now be competently exercised (*a*). Corporations are erected by the Legislature either directly or indirectly,—directly by special act, indirectly by public general statutes, which confer the benefits of incorporation on such associations as comply with their provisions. Of this the Registration Acts may be instanced as examples. Corporations are also sometimes erected by the joint authority both of the Legislature and the Crown,—as, *e.g.*, where the Crown grants a charter under direct authority of a statute (*b*).

General statutes.

Many corporations now exist whose instruments of erection are no longer extant. In such cases they are sometimes said to exist by prescription (*c*). There is, however, an inaccuracy of theory lurking in this statement. No public right can ever be acquired by usurpation, however long continued. It is more correct to say, that where a body is found exercising the powers and privileges of a corporation time out of mind, the law presumes that it had originally been duly incorporated by competent authority, though the instrument has since fallen aside (*d*).

Prescription.

Corporations are also said to exist by implication. Thus a body constituted by proper authority may be held to be a corporation, though its instrument of formation does not bear this *per expressum*, if the purposes for which it was formed cannot be carried into effect without implication of the corporate character (*e*).

Implication.

Corporations are either *sole* or *aggregate*. Corporations sole reside in and infer a perpetual succession of single persons. The most familiar examples of these in the law of Scotland are the Sovereign, the minister of a parish, and some public officials (*f*). Corporations aggregate, sometimes also, though improperly, styled communities, include a number of persons known as the corporators

Corporations—sole and aggregate.

(*a*) Ross's Bell's Dict. 744; Bell's Prin. 2183; Brown's Synopsis 315, 404; M. 2007; *Mowat* v. *Tailors of Aberdeen*, 1825, 4 S. 53; *supra*, p. 33; Grant on Corp. 12.

(*b*) *Governor and Company of the Bank of England*, 5 W. and M. c. 20, charter dated July 27, 1694; *Royal Bank of Scotland*, 1727.

(*c*) Grant on Corp. 6.

(*d*) Shaw's Bell's Prin. s. 2177; *Dempster* v. *Masters and Sea. of Dundee*, 1831, 9 S. 313, and authorities there quoted; *Skirving* v. *Smellie*, 1803, M. 10921; and More's Lect. 212.

(*e*) *Jefferys* v. *Gurr*, 2 B. and Ad. 841; *Att.-Gen.* v. *Davy*, 2 Atk. 212; *University of Glasgow* v. *Phys. and Sur.*, 1840, 1 Rob. App. 397. See Grant on Corp. 6.

(*f*) Shaw's Bell's Prin. 2176; Grant on Corp. 6.

or members, and often, in trading corporations, as the shareholders. It is said in England, that a corporation aggregate may consist of two members only (*a*). But it is very doubtful if this is law in Scotland. Without three the corporate will cannot be expressed by a majority; hence the maxim of the civilians, *Tres faciunt collegium* (*b*), a principle apparently recognised in the law of Scotland (*c*). Corporations sole and corporations aggregate are entirely distinct from each other. A corporation sole cannot become a corporation aggregate by assuming additional members; nor can a corporation aggregate become a corporation sole by diminution of numbers (*d*).

Corporate name.

A corporation ought to possess a name under which it does all corporate acts, and in which it sues and is sued, in the absence of a provision to do so in the name of an official (*e*). The possession of such a name is strong evidence of the corporate character, and is conferred by the charter or act of incorporation. The want of this will not, however, in Scotland be fatal to an old society claiming corporate privileges (*f*); it may be acquired by reputation (*g*) apparently even in England.

Seal.

The right to possess a common seal by which to authenticate their deeds, conveyances, acquittances, etc., is one of the *naturalia* of a corporation (*h*). As this mode of authentication has now fallen in Scotland into great disuse, the privilege is of little importance. Its use has, however, of late years been rendered imperative in some instances by Act of Parliament (*i*).

Corporation property.

Corporations, being in law proper persons, are entitled to hold not only moveables, but lands, in the corporate name—in which name also they are infeft. The members have no right in the corporate property, either joint or several. It is vested solely and exclusively in the person of the corporation, and cannot be attached

(*a*) Grant on Corp. 48.

(*b*) Dig. l. 50, t. 16, *de verb. signif.* 85.

(*c*) See Chapter on Suing and being Sued, and *Rankeillar* v. *Mag. of St Andrews*, 1693, 4 Brown's Sup. 64; *London and Edinburgh Shipping Co.*, 1841, 3 D. 1045.

(*d*) *Anderson* v. *Campbell*, 1736 (Elch. Jur. No. 9), was a case of circumstances, and is of doubtful authority.

(*e*) *Whitehaven and Furness Ra.*, 1848, 10 D. 1127. See Grant on Corp. 50.

(*f*) *University of Glasg.* v. *Fac. of Phys. and Sur.*, *supra*.

(*g*) Vin. Abr. Corporations, E. pl. 14; *Ayray's* case, 3 Salk. 103.

(*h*) Ersk. i. 7, 64.

(*i*) Companies Clauses Act, and some special acts.

in any way whatever for the debts of the corporators (*a*). Such as contract with the corporation must look for payment solely to this property, or its proceeds, as the case may be. The members are in no sense its sureties or guarantees, as in the case of a partnership, unless they choose voluntarily to assume that character. So deeply rooted is this principle in the law, that it required a special statute to enable the Crown to erect corporations in which the members should individually incur liability for the acts or debts of the corporation (*b*). It has sometimes been thought that companies erected into corporations by royal charter in Scotland do not possess limited liability. Such a view is entirely opposed to the theory of corporations, can be supported by no decided case, and seems to have arisen from confusing the proper person of a corporation with the *quasi* person of a firm (*c*).

Limited liability.

The will of the majority, duly expressed at a meeting legally constituted, and acting within the sphere and in accordance with the provisions of the constitution, is the will of the corporation, and binds dissenting members (*d*).

Will of majority.

Corporations have the power of making bye-laws, where this is necessary for accomplishing the purposes of formation. These laws bind the members and servants of the corporation (*e*). To render them binding on the public, would now seem to require the intervention of the Legislature, either directly by special act, or indirectly by statute in aid of a charter.

Bye-laws.

The members are not in general the agents of the corporation; nor have they, as in partnerships, any implied authority to bind it. The corporate affairs are carried on by officials specially charged with that duty; and their number, character, and mode of election are in general very specifically prescribed in the instrument of erection.

Officials.

Endurance in perpetual succession appears to be of the essence

Perpetual succession.

(*a*) Sh. Bell's Prin. s. 2178; Ersk. *supra*.

(*b*) Sh. Bell's Prin. s. 2177. See Lindley 309.

(*c*) 1 More's Lectures 212.

(*d*) *Hill* v. *Fairweather*, 1823, 2 S. 491; *Gray* v. *Smith*, 1836, 14 S. 1062; *Howden* v. *Corp. of Goldsmiths*, 1840, 2 D. 996; Sh. Bell's Prin. 2178; Grant on Corp. 68; *Rodgers* v. *Tailors of Edinburgh*, 1842, 5 D. 295; *Balfour* v. *Edin. North. Ra.*, 1848, 10 D. 1240; *Scottish Centr. Ra.*, 1848, 10 D. 1317.

(*e*) Ersk. i. 7, 64; *Hill* v. *Fairweather*, *supra*; *Corstorphine* v. *Trades of Calton*, 1834, 12 S. 397; *Gray* v. *Smith*, *supra*.

of a corporation. The ideal being constituting the person of the corporation is a continuous identity: the composing units vanish, and are succeeded by others, but the legal entity remains; just as, in a living organism, the substance is continually wearing out and being renewed, while the identity of the individual continues uninterrupted and unimpaired. This is so necessary an attribute of a corporation, that without an Act of Parliament the Crown appears incapable of fixing a term of duration in the incorporating charter (*a*).

Naturalia of corporations.

There are certain incidents so natural to corporations, that the incorporating instrument is held to include them without express mention. These appear to be: endurance in perpetual succession; the power of acting and transacting, suing and being sued, in the corporate name; the right of holding property; the power of expressing the corporate will by majorities; that of making internal regulations for its members; and limited liability.

Special privileges.

There are, again, certain rights and privileges which are not *naturalia* of a corporation, but which, when necessary to be possessed, can be obtained only by statute. Among these may be mentioned aggressive powers, monopolies and exclusive privileges, jurisdiction, and the exercise of any rights or powers trenching on the common law.

Dissolution.

Corporations being created not by the will of their members, but by public authority, cannot be dissolved, like partnership, by the resolution of their members. To effect a dissolution, a surrender of the corporate rights, when these were created by charter, must be duly made to and accepted by the Crown; unless an Act of Parliament is obtained, which will operate a dissolution in whatever way the corporation may have been erected. Corporations may, however, be extinguished by becoming incapable of fulfilling the purposes of their institution, *e.g.* by the total loss of their membership, or by becoming reduced to so small a number as to be incapable of effective management; and by forfeiture, in consequence of abuse of powers, or breach of the implied conditions of their erection. This last mode, however, requires the intervention of the tribunals, to declare the forfeiture and to wind up and dissolve the corporation. A corporation may also be dissolved by mere

(*a*) Grant on Corp. 30; 1 Vict. c. 73, s. 29.

expiration of time, if by Act of Parliament a limited period has been set to its duration (*a*).

Consequences of dissolution.

On dissolution, the donors of the corporation property are entitled to its resumption, in default of which it vests in the Crown. The creditors are, however, generally entitled to insist for sale and distribution in payment of their claims. But in no case can they proceed against the members as such for its debts or obligations, however inadequate the corporation funds may prove for their liquidation (*b*).

Partnerships and corporations contrasted.

Having thus given a general view of the simple partnership and the proper corporation respectively, we shall conclude by pointing out the salient points of difference. A partnership is created by the mere will of the partners; a corporation by public authority. A corporation possesses a *proper* person, a partnership a *quasi* person. The former holds property, acts and transacts, sues and is sued, in the corporate name; the latter, by the intervention of its partners. Limited liability is unattainable by a mere partnership; it is the natural attribute of a corporation. A partnership terminates at the will of its members, generally at that of a single partner, or by his death; a corporation endures in perpetual succession, and can be dissolved only by public authority, by inanition from loss of its component parts, or by elapse of the prescribed period of its existence.

(*a*) See Grant on Corp. 295; Sh. Bell's Prin. s. 2179.
(*b*) See More's Lect. 212.

CHAPTER IV.

OF THE FORMS ASSUMED IN SCOTLAND BY ASSOCIATIONS CONSTITUTED FOR PECUNIARY PROFIT.

General classification.

ASSOCIATIONS for the purposes of gain assume in Scotland a great variety of forms suitable to the nature of the undertakings with which they are concerned; yet, in so far as regards their legal character and import, they may be conveniently classed as follows:—

1. Private partnerships, including common law companies.
2. Companies erected by public authority, but not vested with full corporation privileges.
3. Proper corporations.
4. Proper corporations with peculiar privileges and powers.

I. PRIVATE PARTNERSHIPS AND COMMON LAW COMPANIES.

Private firms.

These are formed at common law by the mere will of the members, and may in like manner be dissolved. Of private partnerships or firms we have already given a general description. They consist of few members, and realize the idea of the Roman *Societas*. Where the partners are associated for a single adventure or transaction, the copartnery is sometimes called a joint adventure, and has been treated of by some writers as a separate contract. But after mature consideration, we have come to be of opinion that there is no good reason for maintaining this distinction, and that, so far from elucidating, it tends rather to obscure the legal principles which necessarily regulate the partnership relation, whether it is applied to a single adventure or to a series of transactions (*a*).

(*a*) *Per* Lord Eldon in *Davidson's* Appeal, 1815, 3 Dow 218; 2 Bell's Com. 649.

Common law companies are essentially partnerships, and differ from private firms in so far only as the rules applicable to the latter are necessarily modified and adapted to meet the requirements of associations with a numerous and fluctuating membership. This is so much the case, that it is not always easy to determine whether a given association should be designated as a partnership or as a company. It may, however, be taken as a general rule, that a partnership deserves the name of a company when it possesses most of the following characteristics: When it is managed by directors, trustees, managers, or other special officers, and not by the whole body of partners; when the shares are of equal value, and transferable at the will of the holder; and when the profits and losses are apportioned with reference to the shares, and not to the partners.

Common law companies.

Where common law companies differ from partnerships, they approach the nature of corporations; and in the law of Scotland, it may be said that they stand midway between the two, being somewhat more than mere partnerships, and somewhat less than corporations. It is their occupying this intermediate and debateable ground that has made them the subject of many legal questions. Under the denomination of *common law companies*, it is intended to comprehend all such associations as, though possessing a more numerous membership than private firms, exist merely at common law, and possess neither the privileges of complete corporations by charter or special act, nor such more restricted rights as may be enjoyed by letters patent or registration,—all such associations, in fact, as are not included under the three remaining classes. Since common law companies are fundamentally partnerships, they will be throughout this work treated of under one category; but care will be taken to point out in the proper places such distinctions in their management and legal consequences as shall be found to exist.

Common law companies approach the corporation.

II. COMPANIES ERECTED BY PUBLIC AUTHORITY, BUT NOT VESTED WITH FULL CORPORATION PRIVILEGES.

Under this category are included companies formed under the Registration Act of 1862, but without limited liability; companies formed under the Letters Patent Act, 1837, 1 Vict. c. 73, without

Imperfect or *quasi* corporations.

the full corporate privileges; and companies whose special act withholds from them some of the *naturalia* of a corporation. They are generally termed *quasi* corporations.

III. PROPER CORPORATIONS.

Proper corporations.

A general description has been already given of such associations. They can only be formed by charter or special act.

IV. CORPORATIONS WITH PECULIAR PRIVILEGES AND AGGRESSIVE POWERS.

Privileged corporations.

Such corporations can only be created by Act of Parliament, and are now generally formed by combination of their special acts with the provisions of one or more of the Consolidation Acts, under which, by their special acts, they are brought. The Consolidation Acts have been enumerated in the Introduction (p. 11).

Order of treatment.

It was originally intended to treat of each of these four classes *seriatim*, exhausting the one before entering on the other. But as the work advanced, it was found that this method would involve much repetition, and a continual reference to earlier chapters; and that the important object of showing how the fundamental principles of the two primary types—viz. the simple partnership and the corporation—have been by legislative aid expanded, limited, or supplemented, so as to meet the requirements of every kind of undertaking, could not in this manner be satisfactorily attained. What is deemed a more commodious method has accordingly been adopted. The four classes will be examined under each division of the subject, carrying them on abreast from their formation to their dissolution, and thus, while avoiding repetition, rendering the one illustrative of the other.

CHAPTER V.

FORMATION OF THE PARTNERSHIP RELATION IN PRIVATE COPARTNERIES AND COMMON LAW COMPANIES.

Writing not necessary.

PARTNERSHIP is one of those contracts which do not require writing for their constitution. It is constituted by mere consent, and may be proved not only by written contract, but by facts and circumstances (*a*).

Writing important.

In all cases, however, when practicable, the contract should be reduced to writing; for, though this will not in general avail in questions with the public, it will obviate many difficulties which may otherwise arise in determining the rights, duties, and liabilities of the partners among themselves. The written contract of partnership generally assumes the form of a contract or of partnership articles. Such documents are at best only limitatory of or auxiliary to the common law, which is always ready to break in when it has not been effectually excluded by contract. What ought to be contained in them will therefore fall to be considered at a subsequent part of this work, after the operation and effect of the rules of the common law have been explained.

Difficulties when the relation has to be inferred from facts and circumstances.

When the contract of partnership has been embodied in a document properly authenticated, the fact that the relation exists, as well as the date of its commencement, can generally be determined without much difficulty; but when, as frequently happens, the existence of the partnership relation has to be inferred from facts and circumstances, the problem becomes very complicated and embarrassing.

(*a*) 2 Bell's Com. 622; 1 More's Lect. 198. *Stevenson* v. *Wright*, 1687, M. 12732; *Logan* v. *Brown*, 1824, 3 S. 15; *Thomson* v. *Campbell's Trustees*, 1831, 5 W. and S. 16; *M'Kinlay* v. *Gillon*, 1830, 9 S. 90, aff. 5 W. and S. 468; *Livingston* v. *Gordon*, 1755, M. 14551. Such also was the Roman law. Dig. lib. xvii. t. 2, s. 4; Story on Part. s. 86-7. It is so also in English law, Coll. p. 3.

These difficulties will be understood, when it is borne in mind that the inquiry is not merely as to the date of the commencement or the termination of a particular firm or company, but frequently extends to such questions as the following: Are A. and B. partners of a particular concern? When did they become so, or when did they cease to be so? Does the partnership relation exist between A. and B., though neither is in connection with any ostensible company or firm? Are B. and C. dormant partners, though admittedly they do not appear to take any concern in the business of the firm? Furthermore, persons who have not constituted partnership *inter se*, not unfrequently find themselves involved in liabilities to the public to the same effect and extent as if they had; and this state of matters is often denominated *quasi* partnership,—a phraseology which, though it may be conducive to brevity of expression, is often productive of great confusion of thought.

The complication and embarrassment to which these various circumstances have given birth are familiar to every student of the law of partnership; and it must be admitted that neither in England nor Scotland have the courts succeeded in laying down practical rules for their effectual removal.

No test of the partnership relation.

In one sense, it is no doubt a question of fact to be ascertained by a jury or its equivalents, whether, in the absence of a written contract or equivalent admission, the partnership relation is established by the facts and circumstances of the case. But this presupposes the possibility of distinctly ascertaining what is of the essence of the contract, or at least of fixing upon some test which shall serve as a means of deciding in all cases whether the facts, as established, are to be taken as evidence of the existence of partnership. The difficulty as to the law of the question would be removed, if the Legislature had arbitrarily defined what constitutes partnership, or if lawyers could have fixed on a definition of that contract at once exhaustive and practical. But such has not been the case. The Legislature has not as yet spoken authoritatively; and no definition has ever been given of partnership, which is either sufficiently exhaustive or sufficiently exclusive to be adopted as a practical rule.

No practical definition.

In the absence of a practical definition, the tribunals have

endeavoured to meet the difficulty by fixing on certain elements, the presence or absence of which has been supposed to furnish a test of the partnership relation. Sharing of profits, contribution to losses, mutual agency, etc., have been all assumed as tests of this kind, and have been more or less in vogue at different periods. When judiciously applied, they are undoubtedly of excellent use in the interpretation of evidence; but their application is often accompanied with great embarrassment, and they cannot be taken as unfailing tests.

Various tests proposed.

The reason of this becomes apparent when the nature of partnership is considered. It is not a simple contract, but one which combines in itself the principles of many contracts, *e.g.* agency, suretyship, guarantee, co-ownership, loan, etc., all of them forming elements which receive more or less prominence, according to the nature and purposes for which the society is formed. Now, sharing of profits, contribution to losses, agency express or implied, are elements which afford strong indications of the partnership relation, and in certain circumstances, and in the absence of proof to the contrary, often irresistibly lead to that conclusion. Yet, taken separately, they may frequently be nothing more than consequences of other contracts; *e.g.* loan, suretyship, simple mandate, and the like. In short, while they are consequences of partnership, they are also consequences of other contracts; and whether they evidence the one or the other, must be judged of from the extent to which they are in combination, and the complexion of the surrounding circumstances. We must not therefore be surprised, if, in reviewing the decisions on this important subject, we find *dicta* seemingly, and sometimes actually, at variance with each other; nor should we look so much for absolute rules, as for indications of how evidence is most likely to be dealt with.

Partnership not a simple contract.

In prosecuting our inquiries into this branch of the subject, we shall consider first, the constitution of partnership properly so called, *i.e.* of the contract whereby the parties to it are on the one hand entitled to the rights, and on the other incur the liabilities of partners. We shall then proceed to examine those cases in which they who are either not partners, or have not been proved to be such, are nevertheless subjected in liability to the public as though they were. And

lastly, we shall endeavour to point out the differences between formed and contemplated partnership.

CONSTITUTION OF PARTNERSHIP PROPER.

Evidenced by right to share profit and loss.

The contract of partnership is usually said to infer a community of interest in the profits and losses, and in the capital of the concern, and also a community of right to share in the management. Cases, however (as we shall afterwards see), are of continual occurrence, in which all of those elements are not found in combination; but yet in which true partnership has been undoubtedly created. A more correct notion of the contract will be obtained if we take the following as a fundamental principle, that wherever persons agree to carry on a certain trade, business, or undertaking of a mercantile kind, on condition of sharing the profits and losses arising therefrom, they constitute amongst themselves the contract and relation of partnership, and that without the necessity of making use of the term partnership or its equivalents (*a*).

Right to share profits.

But when the fact of partnership is disputed, the evidence of a contract to share profit and loss is seldom so clear as this amounts to; and accordingly, if an agreement to share profits *as such* be established, this has for a long time been taken as *ex facie* evidence of the existence of partnership. A right to share profits is of the very essence of partnership. Any agreement by which a man is rendered liable for the smallest share of loss without the chance of profit, may indeed form a valid contract, but it is not the contract of partnership. This principle holds good in every system of European law, and is evident from the very definitions which are given of the contract; all of which, how much soever they may differ in other respects, agree in requiring the right to participate in profits (*b*). It is in virtue of this principle, that societies and clubs, whose object is not the sharing of profits, are not regarded as partnerships; as, for example, societies for the protection of trade (*c*), or clubs for political purposes, or for the convenience of their members (*d*).

(*a*) Voet. Com. ad Pand. l. xvii. t. 2, *pro socio*, s. 1; Ersk. iii. 3, 18; *Green* v. *Beesley*, 2 Bing. N. C. 108; *Greesham* v. *Gray*, 4 Irish Com. Law Rep. 501.

(*b*) See Appendix.

(*c*) *Caldicott* v. *Griffiths*, 8 Ex. 898.

(*d*) *Fleming* v. *Hector*, 2 M. and W. 172; 3 Ross, L. C. 585; *Thomson* v. *Shanks*, 1840, 2 D. 699.

But it is only the right to share profits *as such*, that constitutes evidence of the partnership relation. A right to participate in the *proceeds* of an undertaking, adventure, or business, may exist quite independently of partnership. The distinction here indicated is that between sharing profits and participating in gross returns, and will require some explanation.

Difference between nett profits and gross returns.

Gross returns or gross profits, as they are sometimes styled, is a phrase used among political economists to signify the whole actual proceeds of a transaction, or the income of a business without deduction of outlay, expenses, or liabilities; profits or nett profits mean what remains after such deductions have been made. This distinction is not at first very easily apprehended, and cases occur where it can hardly be drawn with all the clearness that could be desired. Yet it is of great importance in practice, as it affords a good test whereby in many instances the interest which agents, servants, etc., have in a partnership can be distinguished from that of the partners themselves, and whereby the contract itself can be distinguished from others of an analogous or kindred nature. The rule may be stated as follows: An agreement to share profits is *prima facie* evidence of partnership; an agreement to share gross returns is no proof of that relation.

The distinction is delicate, but important.

The force and application of this rule will be best understood by illustrations. In *Wilson* v. *M'Dougal*, 1682, where two men had contracted to purchase a quantity of grain, which the seller was taken bound to deliver to them equally, the Court held that there was no partnership, in respect that *emptio rei facta a pluribus ementibus* did not infer society where there was no *contributio lucri et damni* (*a*). Long afterwards, Lord Mansfield gave a similar decision in *Hoare* v. *Dawes* (*b*); and in *Finckle* v. *Stacy* (*c*), an agreement between workmen to divide their wages was held not to amount to a partnership. In these and similar cases, the contracting parties agree to share, not the profits of the transaction, but the gross produce. But, on the other hand, when a victualling society was constituted for the purpose of purchasing and thereby supplying its members *and the public*, it was held to be a partner-

(*a*) M. 14551.

(*b*) Doug. 371. See also *Gibson* v. *Lupton*, 9 Bing. 297; *Coope* v. *Eyre*, 1 H. Blackstone 37. (3 Ross, L. C. 419, 407, 404.)

(*c*) Select Cases in Ch. 9.

ship. Here the element of sharing profits obviously resulted from trading with the public, and removed the association from the ordinary category of clubs which share the gross returns among their members (*a*).

Again, persons who receive remuneration for their services by payments out of the gross returns of a company, whether that remuneration be a fixed sum or a percentage on the gross returns, are not partners,—as, for example, teachers in proprietary schools, whose incomes in part depend on the number of their scholars; salesmen who receive a percentage on the price of the articles they dispose of in lieu of fixed salaries; sailors on whaling voyages, who are usually paid by obtaining a certain proportion of the produce of the oil obtained, and the like (*b*).

Liability for losses;

Liability for the debts and obligations due by a company or firm is strong presumptive, though by no means conclusive, evidence of partnership properly so called. Such liability may be the consequence of other contracts which, though they enter into, do not constitute, the partnership relation. A man may become surety or guarantee for a firm of which he is in no sense a member; and one may be bound by the acts of his agent without being his partner. Indeed, as we shall afterwards see, it is quite common for persons, by acts, representations, or conduct, to render themselves liable to the public for the obligations of a company in whose profits or management they have no right to share.

not conclusive evidence.

On the other hand, it must be observed that liability to share losses is not, like the right to participate in profits, so essential to the partnership relation, that its absence is to be taken as conclusive evidence against the existence of partnership. No doubt it is impossible by any stipulation to eliminate that responsibility to the public, which is inseparable from all *common law* partnerships; but

(*a*) *Sawers* v. *Tradestown Victualling Society*, 24 Feb. 1815, 18 F. C. 233; *Anderston Vict. Society*, 1828, 6 S. 928. See also *M'Kinlay* v. *Gillon*, 30 Nov. 1830, 9 S. 90, aff. 5 W. and S. 468.

(*b*) *Geddes* v. *Wallace*, 1820, House of Lords, reversing judgment of the Court of Session, 2 Bligh 270, and 6 Paton 643; *Rawlinson* v. *Clarke*, 15 M. and W. 292; *Stocker* v. *Brocklebank*, 3 M'N. and Gor. 250; *Barklie* v. *Scott*, 1 Huds. and Br. 83; *R.* v. *M'Donald*, 7 E. Jur. N. S. 1127; *Harrington* v. *Churchyard*, 6 E. Jur. N. S. 576.

it is quite competent for a partner to stipulate effectively with the others that he shall not be liable for a share of the loss. And this stipulation will receive full effect in a question *inter socios*. Now, in such a case, the partnership relation remains unimpaired, and neither his fellows nor the public could found upon this stipulation against loss (*a*) as evidence of no partnership.

Agency.

Another very important criterion of the existence of the partnership relation is the element of *agency*. The importance of this criterion has only been lately brought into notice; yet its consonance not only with legal principle, but also with equity, would seem to entitle it to great consideration.

Agency is inseparable from the partnership relation. Mr Story says: 'Every partner is an agent of the partnership; and his rights, powers, duties, and obligations are in many respects governed by the same rules and principles as those of an agent. A partner virtually embraces the character of both principal and agent' (*b*); and according to Pothier, '*Contractus societatis non secus ac contractus mandati*' (*c*).

It would seem, therefore, that in this we have a good negative criterion; for where the circumstances of a contract or relation are proved to be such as to exclude the notion of agency express or implied, under what category soever it may fall, it cannot be classed as partnership. It is quite possible, no doubt, that a copartnery may be so constituted, that some of the partners shall contribute merely capital, and shall not have the power of binding the firm; yet independently of the fact that such a stipulation would not avail with the public unless they had due notice, it is still obvious that the remaining partners continue to be agents, not only for themselves, but for all the others. So that in any view it is impossible to eliminate the element of agency from true partnership.

Not an unfailing test.

It must be observed, however, that the presence of this element does not of itself afford a positive test of partnership; for it is quite possible that two parties may stand to each other as agent and

(*a*) *Bond* v. *Pittard*, 3 M. and W. 357; and see *per* Lord Cranworth on this case in *Cox* v. *Hickman*, 8 H. of L. Cas. 310; Ersk. iii. 3, 19.

(*b*) Story on Partnership, p. 1.

(*c*) Pand. lib. xvii. tit. 2, Introduction.

principal without being in any sense partners. Yet where, in any matter of gain or commerce, two or more persons stand *mutually* to each other in the relation of principal and agent,—that is to say, where each of them is capable of binding and being bound by the others,—it is very difficult to escape from the conclusion that the partnership relation has been constituted. Much valuable learning may be obtained on this question by referring to the case already quoted of *Cox* v. *Hickman*, not only as reported in the House of Lords, but also in the Courts of Common Pleas and Exchequer Chamber, in which courts the case had been successively considered (*a*).

Co-owners not partners.

Pro indiviso proprietors or co-owners are not necessarily partners, though in many cases they stand to each other in that relation. Co-ownership, as such, differs from partnership in some important particulars. There is no *delectus personæ;* and therefore the shares are transferable at the will of the owner : the part owners have no lien over the common property for their outlays thereon, they do not share nett profits but gross returns, and there is no implied agency. It may also be observed, that partnership is always created by agreement; whereas co-ownership is seldom the consequence of special contract, but results from succession, bequest, joint purchase, or some other such accident (*b*). These differences are important, but it is far from easy to determine in a case of circumstances whether partnership or co-ownership is the actual state of matters. This arises from the fact that the two so often coexist, and also from their surrounding circumstances being generally so similar.

Differences between.

Important *criteria*.

The most important *criteria* where they can be made available are, that in co-ownership the gross returns and not the nett profits are shared, and that no implied agency exists. It must be admitted, however, that great practical difficulties arise in the application of these *criteria*.

The decided cases in Scotland are few and unimportant. Such as they are, they will be found noted below (*c*).

(*a*) *Hickman* v. *Cox*, 18 C. B. 617, 3 C. B. N. S. 523; *Cox* v. *Hickman*, 8 H. L. Ca. 268.

(*b*) See 2 Bell's Com. 655; Lindley, vol. i. p. 32; and *supra*, p. 3; Stair i. 16, 1; Voet. xvii. 2, 2; Story on Partnership, s. 3; Dig. l. xvii. t. 2, l. 31 *seq.*

(*c*) *Gault* v. *M'Aulay*, Jan. 13, 1821, F. C.; *M'Givan* v. *Blackburn*, 1725, M. 14625.

English cases.

In England the cases have been much more numerous; and as the law of the two countries appears to be the same in this respect, it might be supposed that considerable advantage would be derived from consulting them. But the English courts appear to have done little else than reach the equity of the particular case, without establishing any clear rule by which in future the distinction might be determined. A note of the principal authorities is also subjoined (*a*).

Contributions of skill and contributions of money.

There is a numerous class of cases in which one person contributes property, such as land, machinery, or money, and another skill or business qualifications, and in which it is covenanted that one shall have the management of the property, and take the risk of the loss, while both shall have a share of the profits. The tendency in cases of this kind would be to hold that a partnership had been constituted, because the agreement to share profits is *ex facie* evidence of liability to the public; and this accordingly appears to have been the ratio of the decision in the English case of *Gilpin* v. *Enderbey* (*b*). But this presumption may be overcome by the nature and circumstances of the contract. The very common case of authors and publishers, in which it is agreed that the former shall contribute the manuscript and shall receive a share of the profits, while the latter shall defray the expense of publication and shall take the risk of loss, may here be adverted to. In England, such contracts are usually regarded as partnerships confined on the one side to profits only (*c*); but the law of this country, which holds that publishers and authors are not partners, appears to be more consonant to sound principle (*d*).

(*a*) Lindley 31; Collyer 793; *French v. Styring*, 2 C. B. N. S. 357; *Green* v. *Briggs*, 6 Hare 395; *Campbell* v. *Mullet*, 2 Swanst. 551; *Bentley* v. *Bates*, 4 Y. and C. Ex. 182.

(*b*) 5 B. and Al. 954.

(*c*) Lindley, p. 16.

(*d*) *Venables* v. *Wood*, 23 March 1838, M'F. p. 44; and 8 March 1839, 1 D. 659; 3 Ross L. C. 529.

CHAPTER VI.

OF *QUASI* PARTNERS, OR PERSONS WHO INCUR LIABILITY TO THE PUBLIC, THOUGH NOT PARTNERS.

WE have already seen, that while liability for company obligations is inseparable from the partnership relation, many cases continually recur in which persons who have not constituted partnership amongst themselves are still liable to the world as though they had.

Quasi partnerships.

Such cases are generally classed under the head of *quasi* partnerships, or partnerships as regards third parties. The use of such phrases is convenient, but it must always be borne in mind that the notion they appear to convey is inaccurate, inasmuch as no one can be called a partner who is not so *inter socios;* and that the cases under consideration involve liability not in virtue of the partnership relation, but in consequence of something which has taken place with the public, or in which the public creditor is concerned.

Participation in profits.

The first class of cases may be stated to be those in which a person who has never contracted the partnership relation, has made himself liable to the public by participating in the profits of the concern. We have already observed, that sharing profits is an important criterion of partnership. It may now be added, that when it does not confer the privileges, it commonly involves the participant in the liabilities of that relation. The rule of law is generally stated to be, that a party who shares profits shall be liable to third parties as if he were a partner; or, to use the words of Professor Bell, 'Participation of profits will make one a partner to the world, although he should not be so in relation to the persons with whom he is so engaged' (*a*).

Dictum of De Grey, C. J.

The reason of this doctrine is stated by Chief Justice De Grey as follows: That 'every one who has a share in the profits of a

(*a*) Bell's Com. ii. 623.

trade, ought also to bear his share of the loss; and if any one takes part of the profit, he takes part of that fund on which the creditor of the trader relies for his payment' (*a*).

In *Waugh* v. *Carver*, two ship-agents agreed to allow each other certain portions of each other's profits, but without being affected by each other's acts or losses. The Court held that they were not partners, but that nevertheless they were answerable for the debts of each other, in a question with a creditor who sued both for goods supplied to one (*b*). In *Boulton* v. *Mansfield*, a copartnery was dissolved by the retirement of one of the partners, whose share of stock, etc., was transferred to the partner who continued to carry on the business; but it was provided that the retiring partner should still continue to draw a share of the profits of the concern. It was held by the Court of Session, and affirmed on appeal, that the retiring party was still a partner, and liable as such (*c*). The same liability was extended to persons who were in the position of servants, but were paid a share of the profits instead of a salary (*d*); to such as were paid an annuity out of the profits made by others (*e*); and to the seller of the goodwill of a business, who was to have such share of profit as was in excess of the guaranteed amount (*f*). Ultimately this doctrine was carried so far, that where the property of a partnership was conveyed to trustees, in order that the trade might be carried on for behoof of creditors, such creditors were liable for debts incurred by the trustees in execution of the trust (*g*). And it has even been held, that executors and trustees investing trust funds in a copartnery become individually liable to third parties, though they were not partners even *qua* trustees, and did not individually share any part of the profits (*h*).

Distinction between profits and gross returns.

But, as in the case of actual partnership, a distinction must here be made between profits and gross returns. It is only the sharer of nett profits who can be made liable as a *quasi* partner; the partici-

(*a*) *Grace* v. *Smith*, 2 Wm. Blackst. 998; 3 Ross L. C. 400.

(*b*) 2 H. Bl. 235, and 1 Smith's Leading Cases; 3 Ross L. C. 426.

(*c*) 1787, 3 Pat. App. 70.

(*d*) *Ex parte Digby*, 1 Deac. 341; *ex parte Rowlandson*, 1 Rose 89.

(*e*) *Re Colbeck*, Buck 48; *ex parte Hamper*, 17 Ves. 412, 3 Ross L. C. 456; *ex parte Chuck*, 8 Bing. 469.

(*f*) *Barry* v. *Nesham*, 3 C. B. 641.

(*g*) *Hickman* v. *Cox*, 18 C. B. 617; aff. 3 C. B. N. S. 523.

(*h*) *Wightman* v. *Watson*, 1 M. and S. 412; *ex parte Garland*, 10 Ves. 119.

pator in gross returns incurs no such responsibility. Thus a sailor employed in a whaling ship, was held not liable to third parties, though he received as wages a certain share of the oil brought home (*a*); and the same was decided in the case of a workman who was paid by a proportion of the gross gains (*b*), and of a captain who was to receive as wages one-fifth of the profits on an intended voyage (*c*).

Origin of this kind of liability.

When a party incurs liability to the public creditor in respect of his participating in profits, that liability arises not from any presumption that, when he entered into the contract out of which the claim arose, the creditor had the personal responsibility of such party in view, but solely, as already stated, from the equitable consideration that no man shall share that fund out of which the creditor looks for payment, without becoming responsible for the claim. It is of no consequence, therefore, whether at the date when the claim or debt was contracted, the creditor knew that the party in question was a participator in the profits of the concern; it is enough if he discover and can prove this fact when he seeks to render such party liable (*d*). The same reasoning applies in this case as applies in that of dormant partners, who exercise none of the rights of ordinary partners, except that of sharing the profits, and who yet, when discovered, have always been held liable to the public creditor (*e*).

In concluding our observations on this class of cases, it may be observed that the doctrine which we have been considering, though in the main it has worked well in the interests of substantial justice, is not always capable of being very clearly applied in practice, and may in some cases produce results at least apparently harsh (*f*). It has been adopted in the American law (*g*), but was

(*a*) *Wilkinson* v. *Fraser*, 4 Esp. 182. 3 Ross L. C. 453.

(*b*) *Benjamin* v. *Porteous*, 2 H. Blackst. 590; *Dry* v. *Boswell*, 1 Camp. 330, 3 Ross L. C. 455.

(*c*) *Mair* v. *Glennie*, 4 Maule and Selw. 239. See Story on Partnership, chap. iv.; see also Bell's Prin. 363-4.

(*d*) *Waugh* v. *Carver*, 2 H. Blackst. 235; *ex parte Digby*, 1 Deac. 341; *re Colbeck*, Buck 48; *ex parte Hamper*, 17 Ves. 412; *Barry* v. *Nesham*, 3 C. B. 641.

(*e*) *Logy* v. *Durham*, 1697, M. 14566; *Kinnear* v. *Cunningham*, 1765, 2 Paton 114; *M'Leod* v. *Howden*, 1839, 1 D. 1121; *M'Kinlay* v. *Gillon*, 1830, 9 S. 90, aff. 5 W. and S. 468. See Bell's Com. ii. 623, and Prin. 363-4.

(*f*) See Lindley, p. 36.

(*g*) Story on Partner. pp. 46 *et seq.* It does not seem to have been carried

unknown to the civilians, and does not appear to have found its way into any continental code (*a*).

Agency.

More recently, the liability of persons not partners, or not proved to be partners, to be made responsible for company obligations, has in cases such as those we have just been considering, been referred to the doctrine of agency, express or implied, rather than to that of sharing profits. And this view certainly appears more intelligible in itself, and more in consonance with legal principle.

Lord Cranworth's *dictum*.

In the late case of *Cox* v. *Hickman* (*b*), Lord Cranworth stated: 'It is often said that the test, or one of the tests, whether a person not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is whether he is entitled to participation in the profits. This no doubt is, in general, a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive evidence, that the trade in which the profits have been made was carried on in part for, or on behalf of, the person setting up such claim. But the real ground of liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say, that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say, that the same thing which entitles him to the one makes him liable to the other, —namely, the fact that the trade has been carried on in his behalf, *i.e.* that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made.' Lord Cranworth then took occasion to review some of the more important decisions which have already been referred to, and in relation to them observed: 'I can find no case in which a person has been made liable as a dormant or sleeping partner, where the trade might not fairly be said to have been carried on for him,

so far in America as in England. By means of legal subtleties, its operation has been apparently confined under that system.

(*a*) Dig. l. xvii. t. 2, l. 34; Pothier, Pand. lib. xvii. t. 2, n. 4, *Id. Tr. de Société*, n. 13; Duranton, *Droit Franc.* tom. xvii. *de Société*, n. 332; Duvergier, *Droit Civil Franc.* tom. xv. n. 45; Voet. ad Pand. lib. xvii. t. 2, s. 2; Pardessus, *Droit Comm.* tom. iv. n. 969, and tom. ii. 506.

(*b*) 8 House of Lords Cases 309.

together with those ostensibly conducting it, and where, therefore, he would stand in the position of principal towards the ostensible members of the firm as his agents.'

Lord Wensleydale's *dictum.*

Lord Wensleydale adopted the same view; and after stating that partnership was merely a branch of the law of principal and agent, and that it would tend to simplify and make more easy of solution the questions which arise on this subject, if this true principle were more constantly kept in view, he proceeded to say: 'A man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent; and the principal is liable for the agent's contracts in the course of his employment. So, if two or more agree that they should carry on a trade and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contract in carrying on the trade as much as a single principal would be by the act of an agent who was to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment. I believe this is the true principle of partnership liability. Perhaps the maxim, that he who partakes the advantage ought to bear the loss, often stated in the earlier cases on this subject, is only the consequence, not the cause, why a man is made liable as a partner.'

Upon the principle that agency is in such cases the ground of responsibility, and that in the case under consideration it did not exist, the House of Lords reversed the judgment of the Court below. No cases, in so far as we are aware, have yet occurred in which this decision has been either followed or commented on; and it is therefore premature to speculate on its probable effect on this branch of the law of partnership. It is, however, very plain, that while it professes to leave intact the equity of the former decisions, *e.g.* *Waugh* v. *Carver*, *Barry* v. *Nisham*, etc., it places them on a new foundation, and seems to inaugurate a principle of decision which is more intelligible in itself, and less likely to mislead or embarrass in the application, than the old doctrine of participation in nett profits being a ground of liability to the public. It cannot, how-

ever, escape observation, that the test here proposed is in some respects as difficult of application as its predecessors; that agency is often as much a result as a proof of the partnership contract; and that many cases may be figured, in which agency, so far from leading to the inference of partnership obligations, can only be inferred after that contract has been established from other considerations.

Holding out.

Persons may also incur the liabilities of partnership by what is termed '*holding out.*' Here persons who are not partners, and who may not be entitled to share profits, or to exercise any of the other rights of the partnership relation, render themselves liable to creditors of a company or firm, by reason of their having, prior to the contraction of the debt for which they are responsible, held themselves out as partners, that is to say, done or permitted something to be done, which naturally led to the conclusion that their credit was pledged to the concern—that they were its guarantees, or that it was their agent. This doctrine is indeed a necessary consequence of the law of principal and agent, whereby if any man hold out another as his agent, he is bound by that other's acts within the sphere of the agency. It is also a consequence of the principle, that the partners are guarantees for the company obligations. The public, in the case of unregistered companies, have no means of knowing who are *de facto* partners—that is to say, whose credit is pledged to the company—except by judging from appearances; and they are therefore entitled to assume those to be partners whose conduct plainly leads to that conclusion.

The doctrine in question is thus a necessary consequence of the theory of private partnerships and common law companies, in which the credit of the concern depends on implied agency and implied guarantee, as opposed to the property of a corporation or the guarantee of a registered company. It would consequently seem, that while it is essential to the existence of common law partnerships, it is inapplicable in the case of such associations as are formed by registration, by charter, or by special act.

Waugh v. *Carver.*

The leading case in support of the doctrine of liability by holding out is *Waugh* v. *Carver* (*a*). In this case the law is very clearly

(*a*) 2 H. Blackstone 235; 3 Ross L. C. 426; *ex parte Watson*, 19 Ves. 461; *ex parte Matthews*, 3 V. and B. 125; *Edmundson* v. *Thompson*, 2 Fos. and Fin.

stated by C. J. Eyre, and it has always been regarded as an authority in this country as well as in England. In the late case of *Cox* v. *Hickman*, already referred to, the House of Lords took occasion to revert to the grounds of the decision in *Waugh* v. *Carver*, and the judgment of Lord Cranworth may be read with great advantage (*a*).

It is of no importance to the question of liability on this ground, whether the party, holding himself out as a partner, does or does not share profits and losses; for the point is not whether he is *de facto* a partner, but whether he has so acted as to lead others to that conclusion (*b*), or in other words, whether he is by his conduct estopped from pleading that he is not a partner (*c*). It has therefore been held sufficient that the party has allowed his name to be kept on bills of parcels, or invoices, or to remain over the door (*d*).

Use of a party's name.

If a party's name has been introduced into a firm without his consent, he ought to take immediate steps to get it withdrawn, or otherwise to certiorate the public that he is not a partner; for if he remain silent, and it can be proved that he knew that his name was used in this manner, he may be found responsible as a partner (*e*).

Party's name must have been the ground of credit.

But inasmuch as the ground of liability is, that credit has been obtained by means of the party's name, it is necessary that the holding out shall have taken place, and that the creditor shall have been in the knowledge thereof prior to his entering into the contract sued upon, otherwise it could not be said that he had been misled by the conduct of the supposed partner. See the judgment of Mr Justice Park in *Dickenson* v. *Valpy* (*f*), *Vice* v. *Anson* (*g*), and the other cases quoted below. It is the more necessary to attend to this important element by which the liability of alleged partners is ascertained and limited, inasmuch as it is apparently ignored in many treatises on partnership law. By parity of reasoning, it should seem that where a party's name appears in a firm as a partner, but when

564; *Kirkwood* v. *Cheetham*, 10 W. R. 670, Ex.; 2 Fos. and Fin. 798; *Gardner*, 1862, 24 D. 315.

(*a*) 8 House of Lords Cases 309.

(*b*) *Ex parte Watson*, *supra*.

(*c*) *Pickard* v. *Sears*, 6 A. and E. 469; *Freeman* v. *Cooke*, 2 Ex. 654.

(*d*) *Williams* v. *Keats*, 2 Starkie 290.

(*e*) *Gardner*, 1862, 24 D. 315.

(*f*) 10 B. and C. 140; 3 Ross L. C. 570.

(*g*) 7 B. and C. 409. *Baird* v. *Planque*, 1 Fos. and Fin. 344; *Fox* v. *Clifton*, 6 Bing. 776; *Pott* v. *Eyton*, 3 C. B. 32; *Newsome* v. *Coles*, 2 Camp. 617, 3 Ross L. C. 634.

by a private stipulation he is declared not to be liable as such in a question *inter socios*, he does not incur liability to third parties who, when the debt was contracted, were aware of this stipulation; and it appears to have been so held in the case of *Alderson* v. *Pope* (*a*). But there are good reasons to doubt the soundness of this principle, both as giving facilities to the establishment of false credit, and because such a stipulation would after all amount to nothing more than a guarantee against loss in favour of one partner by the others.

Fraud by third persons no ground of estoppel.

It is no defence against an action on the ground of liability from holding out, that the defender was induced so to do by the fraudulent representations of parties other than the pursuer (*b*).

Holding out does not apply after death.

The doctrine of liability by holding out has never been understood so as to render the estate of a deceased partner liable for debts contracted subsequent to his death by the surviving members of the firm, even to old correspondents or customers, on the ground that his name was still allowed to remain in the concern. The reason of this is, that death, as we shall afterwards see, operates of itself as a dissolution of the partnership, and is a public fact requiring no intimation, and that the continuance of the name cannot be presumed to be the act either of the deceased or his representatives (*c*). If, however, the name of the deceased partner be continued in the firm by his executor, the estate will be bound, and the executor will render himself liable to the beneficiaries (*d*).

Holding out, as intending partner, not enough.

As persons intimating an intention to become partners are not taken to be such until their intention has given place to performance, so neither do those who hold themselves out as intending partners incur the liability which would attach to them if they held themselves out as partners *de facto*. Thus, one who had signed the prospectus of a contemplated company was found not liable as though he had held himself out as a partner (*e*).

(*a*) 1 Camp. 404, note.

(*b*) *Watson* v. *Smith*, 17 Dec. 1806, Hume 756. See also the English cases of *Ellis* v. *Smoeck*, 5 Bing. 521; *ex parte Broome*, 1 Rose 69.

(*c*) *Webster* v. *Webster*, 3 Swanst. 490; *Devaynes* v. *Noble*, 1 Mer. 616. See More's Stair, p. 102, Lect. ii. 207; *Christie* v. *Royal Bank*, 1841, 2 Rob. 118; *Warner* v. *Cunningham*, 24 June 1798, M. 14603, 3 Dow. 76.

(*d*) *Vulliamy* v. *Noble*, 3 Mer. 614.

(*e*) *Bourne* v. *Freeth*, 9 B. and C. 632; *Reynell* v. *Lewis*, 15 M. and W. 517; *Wyld* v. *Hopkins*, *ibid.*

Effects of agency and guarantee where no partnership exists.

As in proper partnership the liability of the individual partners for company debts rests upon the two principles of implied mandate and suretyship existing between the *socii* in virtue of the contract itself, so in like manner a man may render himself liable for the acts of others by one or other of these principles, not only where he is not a partner, and where he has never held himself out as a partner, but where no partnership has yet come into existence. Thus, when '*promoters*' of contemplated companies pass resolutions that work is to be done or goods are to be supplied, they become liable for all expenses that may thereby accrue, though they are not partners, and though the company should never have any being (*a*). And it is not to be doubted, that if a man becomes cautioner for a firm, he incurs liability though *ex hypothesi* he is not a partner, nor presumed to be such.

Sub-partnerships.

It is a principle of the law of partnership, that no one can be introduced into a copartnery without the consent of all the members. Yet there may be a contract formed with one of the partners by which a stranger is admitted to divide with him his share of the profits. The relation so created is termed a sub-partnership, and constitutes a binding obligation. But it does not make the stranger a partner with the other members of the concern, according to the maxim of the civil law, *Socius mei socii, socius meus non est* (*b*); neither does he by sharing profits become liable for the debts of the company (*c*).

(*a*) *Doubleday* v. *Muskett*, 7 Bing. 110; *Braithwaite* v. *Skofield*, 9 B. and C. 401; *Burls* v. *Smith*, 7 Bing. 705.

(*b*) Pothier, Part. sec. 91.

(*c*) See Bell's Mer. Law ii. 654; Lindley 52; Ersk. iii. 3, 21; *Fairholm* v. *Marjoribanks*, M. 14558, and Ross's Le. Ca. 697; *ex parte Barrow*, 2 Rose 252, *per* Lord Eldon; *ex parte Dodgson*, Mont. and M'Ar. 445; *Bray* v. *Fromont*, 6 Madd. 5; *Killock* v. *Greg*, 4 Russ. 285.

CHAPTER VII.

DIFFERENCE BETWEEN A FORMED AND A CONTEMPLATED PARTNERSHIP.

It is often difficult to determine whether a partnership really exists, or is only contemplated. In such cases, it is important to distinguish between the mere indication of intention to enter into partnership, and an agreement to form this contract on the emergence of a given condition.

Mere intention does not complete the contract.

Where nothing more is proved but intention, it is in the power of either party to resile before perfecting the contract (*a*); and in like manner, where a party agrees to enter into a partnership at a future period, but reserves to himself the option of departing from this agreement before elapse of the stipulated time, no partnership will be held to be created, if in the *interim* he declare that he has altered his intentions (*b*). Where the plaintiff agreed to enter into a partnership with the defendant, as to the working of a patent, provided he should be satisfied of its utility by the result of later experiments, which satisfaction he was to declare in writing, and he never expressed such satisfaction, it was held that no partnership had been constituted (*c*). Where, again, parties agree to enter into partnership on the emergence of a certain condition, and retain no option, the contract will be held perfected by the mere purification of the condition, because the necessary consent, which before is supposed to be suspended, is on that event held to be adhibited (*d*). It is in virtue of this principle that allottees of scrip in companies to be incorporated by parliamentary authority, may be registered by

Agreement *sub conditione.*

(*a*) *Howell* v. *Brodie*, 6 Bing. N. C. 44.

(*b*) *Gabriel* v. *Evill*, 9 M. and W. 297; *ex parte Turquand*, 2 M. D. and De G. 339.

(*c*) *Osborne* v. *Jullion*, 3 Drew 596.

(*d*) *Battley* v. *Lewis*, 1 Man. and Gr. 155.

the company as shareholders as soon as the special act is obtained, not only without their knowledge, but even against their express desire.

Condition must be purified.

But, *e converso*, it is equally fixed law, that until the condition is purified, no partnership is constituted. Thus where persons associate with the view of forming a company in a particular manner, as by signing articles of association, or obtaining charter or special act, they are not held to be partners until the company has been formed in the manner contemplated. Many illustrations of this will be found under the head of Promoters (*a*). In like manner, when it plainly appears that the company was not to commence operations until a certain amount of capital had been subscribed, the subscribers will not be held bound as partners if the company start before obtaining subscriptions to the stipulated amount (*b*). Nor will it make any difference that the subscribers had paid deposits, and even calls, on the shares allotted to them; but for these they will be entitled to an action of repetition (*c*). In such cases, however, it must clearly appear that the condition was of the essence of the contract—a condition precedent to the formation of the company. If this is not so, the non-purification will be disregarded, and the subscribers held partners (*d*). The same result will follow where it appears that the defender has expressly or by implication waived the non-implement of the condition (*e*).

Condition must be essential.

Specified purposes a condition of the contract.

Again, when persons agree to become members of a company to be formed for certain specific purposes, and subject to certain regulations, they are not bound to take shares in a concern formed for different purposes or with a different system of management. In such a case an important condition of their contract has not been

(*a*) See *Reynell* v. *Lewis*, and *Wyld* v. *Hopkins*, 15 M. and W. 517; *Wood* v. *Argyll*, 6 Man. and Gr. 928; *Batard* v. *Hawes*, and *Batard* v. *Douglas*, 2 E. and B. 287; *Forrester* v. *Bell*, 10 Ir. Law R. 555; *Hutton* v. *Thompson*, 3 House of Lords Cases 161.

(*b*) *Brown* v. *Fruth*, 9 B. and C. 632; *Vice* v. *Anson*, 7 B. and C. 409.

(*c*) *Fox* v. *Clifton*, 6 Bing. 776, overruling *Perring* v. *Hone*, 4 Bing. 28; *Pitchford* v. *Davis*, 5 M. and W. 2.

(*d*) *Turner* v. *Mollison*, 30 May 1833, 11 S. 669; *Caledonian Dairy Company* v. *Campbell*, 4 Feb. 1834, 12 S. 394; *MacAlister* v. *Alexander*, 2 June 1837, 15 S. 1061, aff. 7 May 1839, M'L. and Rob. 353.

(*e*) *Tredwin* v. *Bourne*, 6 M. and W. 461; *Steigenberger* v. *Carr*, 3 Man. and Gr. 191; *London and Continental Insurance Company* v. *Redgrave*, 4 C. B. N. S. 524; *Peel* v. *Thomas*, 15 C. B. 714.

purified (*a*). And it is no answer that deposits have been paid on the allotted shares, unless it can be shown that the defender was at the time aware of the alteration (*b*).

Prescribed formalities

It frequently forms a part of the articles of copartnery or other document by which the partnership is regulated, that certain conditions must be fulfilled, or certain formalities must be complied with, before a person can be made a partner either originally or by transfer of shares.

must be observed.

In such cases the general rule of course requires that the regulations shall be observed; but when they have been overlooked, the Court will not give effect to their non-observance so as to avoid the contract of partnership, unless it is pleaded at the instance of the party for whose interest and behoof they had been framed (*c*).

Waiver.

When, again, the party interested in the observance of the stipulated conditions or formalities has waived them *per expressum* or by implication, or in other words, where such party has homologated the irregularity, the objection cannot afterwards be taken (*d*). But such conditions or formalities will be very strictly enforced when they are pleaded by the party for whose benefit they were framed, and whose interest is affected by their non-observance (*e*).

(*a*) *Ward* v. *Matheson*, 13 Feb. 1829, 7 S. 409; *Learmonth* v. *Adams and Co.*, 23 June 1831, 9 S. 787; *Blackburn's* case, 3 Drew 409.

(*b*) *Ex parte Rye*, 3 E. Jur. N. S. 460; and *Fox* v. *Clifton*, 6 Bing. 776; *Galvanized Iron Co.* v. *Westoby*, 8 Exch. 17.

(*c*) *Weatherly* v. *Turnbull*, 3 June 1824, 3 S. 61; and *East Lothian Bank* v. *Turnbull*, *ibid.* 63; *Macandrew* v. *Robertson*, 11 June 1828, 6 S. 950; *Thomson* v. *Fullarton*, 23 Dec. 1842, 5 D. 379; *Robertson* v. *Thom*, 29 Dec. 1848, 11 D. 353.

(*d*) *Turnbull* v. *Allan and Son*, 1 March 1833, 11 S. 487, aff. 8 April 1834, 7 W. and S. 281; *Drummond* v. *Thomson's Trustees*, 22 May 1834, 12 S. 620.

(*e*) *Sir James Gibson Craig* v. *Aitken*, 3 Feb. 1848, 10 D. 576.

CHAPTER VIII.

EVIDENCE OF PARTNERSHIP.

WE have already endeavoured to show what in law will be deemed sufficient to establish partnership and its liabilities. It is now necessary to consider briefly the kind of evidence which is admissible.

Partnership is a consensual contract, and may be proved *prout de jure;* that is to say, if the statements averred be relevant, they may be proved in any way which the law allows to prove facts and circumstances.

Distinction between evidence of proper and *quasi* partnership.

In considering what is necessary or relevant to be averred, regard must be had as to whether the action is brought with the view of establishing actual partnership on behalf of the pursuer, or whether the object be to fix responsibility against the defender at the instance of some third party; in other words, whether actual or merely *quasi* partnership is sought to be made out. If actual partnership is sought to be established, this must be averred, and the proof must amount either to a distinct contract to that effect, or at least to an agreement to share profit and loss in some specified business or sphere of action. If, again, *quasi* partnership, or in other words, responsibility to third parties, is all that is endeavoured to be made out, it does not seem necessary in every case to libel or prove actual partnership, but such facts and circumstances as plainly infer the required responsibility. The reason of this difference will appear when it is remembered that liability to third parties arises not only from actual partnership, but from such a line of conduct on the part of the defender as affects the fund available to creditors, or leads them to contract on the faith of his credit being pledged to the concern—*e.g.* sharing of profits, agency, or holding out. No doubt there are cases in which a latent partner who has not as yet shared profits, and whose existence was not known at the date of

the contract, can only be made responsible by proving him to have been an actual partner. When such is the case, actual partnership must be libelled and proved.

Documentary evidence, when it can be obtained, is undoubtedly the best; *e.g.* written contracts, prospectuses, advertisements, correspondence, office-books, registers, and the like, whose meaning is unequivocal, and which are either properly attested, validated *rei interventu*, or connected with the alleged partner in an unmistakeable manner. In the absence of or in supplement of such evidence, the testimony of clerks, agents, servants, strangers, or of the alleged copartners themselves, may be resorted to. Documentary evidence.

It must be observed, however, that the statements, acts, or admissions of the alleged copartners stand in a very different position from their evidence on oath. It is only after the trial has proceeded so far that the pursuer has made out a *prima facie* case, or has at least shifted the *onus probandi*, that these adminicles of evidence are admissible (*a*). Admissions.

Admissions by the defender are entitled to great weight, and are often conclusive (*b*); yet their effect may be entirely taken off if it can be shown that they were made under a misapprehension, or have been misconstrued (*c*).

It is hardly necessary to observe, that a witness cannot be asked whether he believes that a partnership exists; he must give facts and circumstances from which the jury may draw that inference (*d*).

In conclusion, it may be observed that the question of what evidence is admissible to prove partnership must be solved by the common rules of evidence as applied in the investigation of any matter of fact; since, according to the law of Scotland, it is one of those contracts in which the proof is unfettered by special rules. As, however, it may be useful to the practitioner to have before

(*a*) *Smith* v. *Puller*, 1820, 2 Mur. 342; *Norton* v. *Seymour*, 3 C. B. 792; *Nicholls* v. *Dowding*, 1 Stark. 81; *Campbell* v. *Macfarlane*, 1840, 2 D. 663, M'F. 200; Dickson on Ev. sec. 1465; 2 Bell's Com. 399, n. 4.

(*b*) *Clay* v. *Langslow*, 1 Moo. and Mal. 45.

(*c*) *Vice* v. *Anson*, 7 B. and C. 409; *Ridgway* v. *Phillip*, 1 Cr. M. and R. 415; *Brockbank* v. *Anderson*, 7 Man. and Gr. 295; *Smith* v. *Puller*, 1820, 2 Murray 342; *Venables* v. *Wood*, 1838, M'F. 44.

(*d*) *Chatto and Co.* v. *Pyper*, 1827, 4 Mur. 354.

him the kind of evidence which has been given effect to in our courts, the following lists of the more important cases have been prepared:—

Cases in which actual partnership was sought to be proved:—*Cunningham* v. *Kinnear*, 1764, H. of L. 1765, 2 Pat. App. 114; *Mack* v. *Cleland*, 1832, 10 S. 851; *M'Taggart's Representatives*, 1834, 12 S. 338; *Fergusson* v. *Grahame*, 1836, 14 S. 871; *Fraser* v. *Hair*, 1848, 10 D. 1402; *Fraser* v. *Hill*, 1854, 16 D. 789.

Cases in which partnership as regards third parties was sought to be proved:—*Wilkie* v. *Johnstone*, 1808, 5 Paton's App. 191; *Sawers* v. *Tradeston*, 1815, 18 F. C. 233; *Smith* v. *Puller*, 1820, 2 Mur. 342; *Learmonth and Co.*, 1825, 1 S. App. 481; *Logan* v. *Brown*, 1824, 3 S. 12; *M'Kinlay* v. *Gillon*, 1830, 9 S. 90, aff. 1831, 5 W. and S. 468; *Dundee Ra. Co.*, 1832, 10 S. 269; *Wright* v. *Arthur*, 1832, 11 S. 212; *Venables* v. *Wood*, 1838, M'F. 44, and 1839, 1 D. 659; *Baxter* v. *Aitchison*, 1841, 3 D. 391; *Blackwood* v. *Hay*, 1858, 20 D. 631; *Aberdeen Bank* v. *Clark*, 1859, 22 D. 44.

CHAPTER IX.

DIFFERENT KINDS OF PARTNERS.

It is usual, in treatises on partnership law, to make use of certain phrases in order to distinguish from each other the different kinds of partners. These phrases will be here enumerated and explained as they are generally understood.

Active partners.

1. *Active or managing partners* are such as are in reality members of the firm, and act both as its agents and sureties. They are also sometimes styled *ostensible partners;* but this phrase is ambiguous, as it is often used to indicate *nominal partners.*

Nominal partners.

2. *Nominal partners* are they who appear or are held out to the world as partners, but who have no real interest in the business.

Dormant partners.

3. *Dormant or sleeping partners* are properly such as, whether known or unknown, have no power of agency to bind the firm; but, while liable for its obligations and entitled to share profits, are passive as to its management. The phrase is often, however, used in the sense of *latent* or *quasi* partners.

Latent partners.

4. *Latent partners,* sometimes also called *secret* or *silent* partners, are persons whose existence as partners is not known to the world; but who, sharing profits, are either *de facto* partners, or are liable to the world as though they were. Generally speaking, latent partners take as much share in the conduct of the concern as they whose names appear in the firm.

Quasi partners.

5. *Quasi partners,* or *partners as to the world,* are such as, not being partners *inter socios,*—that is, partners in the proper sense of the word,—are nevertheless liable for the company obligations by reason of something which they have done, or permitted to be done.

Imperfection of the terminology.

This terminology is useful as conducing to brevity of expression; but the phrases employed are not in themselves the most felicitous to express the true import of the legal relations in which

the various classes of partners stand to themselves and the public; and, what is still more to be regretted, they have never been defined with any accuracy, and are used in very different senses by different writers. In these circumstances, little use will be made of them in the present treatise; but it is hoped that the explanation given will be sufficient to render their meaning, when they do occur elsewhere, intelligible.

CHAPTER X.

PUBLIC COMPANIES.

PRELIMINARIES TO FORMATION.

Formation of common law companies.

COMMON law companies are formed in the same way as partnerships, viz. by agreement. To this writing is not an essential; they may be proved *rebus ipsis et factis*. In the general case, however, the company is formed by means of a deed, styled company articles, articles of association, deed of settlement, etc. This instrument is signed by all the members, and is supposed to contain the constitution of the company.

Formation of incorporated companies.

Incorporated companies are formed by their charter, special act, or by registration; and until these have been obtained, the company does not come into existence.

Before, however, a public company is formed, whether it be a common law company, a company privileged by letters patent, or incorporated by charter, special act, or registration, a good deal of procedure takes place, which may be called preliminaries to formation.

Prospectus.

When a company is projected, its promoters generally endeavour to obtain support by publishing to the world in as favourable a manner as possible the nature of the proposed undertaking, the amount of capital required, the number of shares, and the return which the shareholders may expect from their contributions. This is ordinarily done by means of advertisement, circulars, preliminary notices, etc., but principally by issuing a prospectus, which may be regarded as containing the terms upon which the promoters agree to contract with the public. Those who desire to support the undertaking, request the managers to allot them a certain number of shares, and sign the application, which is generally in a printed form.

Letter of allotment.

If the company be already formed before the prospectus has been issued, as was often the case with common law companies, and is almost always now with registered companies, and if the applicant receive a letter of allotment imposing no new condition, and leaving nothing open for future acceptance or rejection, the application on the one hand and the allotment on the other form a contract based on the prospectus, and the applicant is converted into the shareholder (*a*). If, however, the letter of allotment be not a simple acceptance of the application, but something more, something less, or something different, it is a new offer which the applicant may either accept or decline (*b*). An offer not accepted within a reasonable time is held as declined (*c*).

Suspensive conditions.

If again it appear from the prospectus, or be otherwise proved to be the intention of the promoters, that the company shall not be formed until something which yet remains to be done shall have been accomplished, the acceptance, which in that case is *sub conditione*, does not create partnership until the condition has been purified. Thus, in common law companies, it has often been made a suspensive condition, that a certain amount of capital shall be subscribed, certain inventions found workable, or that certain advantages shall be secured before the company is formed; and in undertakings requiring privileges, it is often conditioned that the association shall be formed under royal charter or special act.

Scrip-certificate.

In such cases the applicant generally receives an acknowledgment, usually termed a scrip-certificate, to the effect that he is entitled to receive a certain number of shares when the company has been duly formed. This certificate does not constitute the holder a partner in the company, but creates a right to acquire, and an obligation to take, a certain number of shares (*d*); so that when the company is formed, he may compel it to receive him as a shareholder, and it may render him such against his will (*e*).

Scrip-certificates, when stamped, are transferable by mere delivery, and seem to require no indorsement. They therefore often

(*a*) *Pulsford* v. *Richards*, 17 Beav. 87; *Jennings* v. *Broughton*, *ibid.* 234.

(*b*) *Fox* v. *Clifton*, 6 Bing. 776; *ex parte Rye*, 3 E. Jur. N. S. 460; *Duke* v. *Andrews*, 2 Ex. 290.

(*c*) *Carmichael*, 17 Sim. 163; *Mathew*, 3 De G. and S. 234.

(*d*) *Jackson* v. *Cocker*, 4 Beav. 59.

(*e*) *Kidwelly Canal Co.*, 2 Price 93; *Midland Great Western Rail. Co.*, 16 M. and W. 804.

pass through many hands before the company has obtained its special act, or has otherwise been formed (*a*).

Registration of scrip.

When this takes place, the company may register the original allottee, if the scrip-transferree does not come forward (*b*); and whether he does so or not, the company are entitled to register the original allottee, if they are not satisfied with the solvency of the scrip-transferree. For the contract was made with the allottee, and the company were not parties to the subsequent transferences (*c*). The company, moreover, may register the scripholders who present themselves, without inquiring whether they are allottees or transferrees (*d*). If, however, after transfer of scrip, the original allottee be registered without the consent of the scrip-transferree, he becomes a trustee for the latter, and accountable to him for the proceeds of the shares (*e*). If the company register the scrip-transferree, they thereby pass from all claims against the original allottee (*f*).

Scripholders not partners.

Scripholders are in no sense of the word copartners, any more than promoters are; yet the possession of the scrip-certificates vests the holders with certain rights. Thus they may apply to the Court to interdict the promoters from misapplying the funds of the concern (*g*); and where the company is wound up as abortive, the scripholders have been found entitled to share the dividend (*h*).

Disuse of the scrip-certificate.

The issuing of scrip-certificates, however convenient for some purposes, is attended with many disadvantages, and has often given occasion to fraudulent transactions. It has accordingly very much fallen into disuse.

Subscribers' contract.

In the case of railway companies and other associations formed by special act, the procedure for formation now generally begins by an agreement, popularly called a subscribers' contract, which is drawn up by the promoters, and

(*a*) Hodges 123.

(*b*) *East Lothian Rail. Co.* v. *Peffers*, 1849, 11 D. 1184.

(*c*) *Ross* v. *East Lothian Rail. Co.*, 1848, 10 D. 1284; *Midland G. W. Rail.*, 5 Rail. Cases 76.

(*d*) *Birmingham and Thames Rail. Co.*, 1 Q. B. 256; *Lauder* v. *Orr and Others*, 1853, 15 D. 670; *Edin. and Leith R. Co.* v. *Manson*, 1842, 4 D. 865.

(*e*) *Lauder* v. *Orr and Others*, 1853, 15 D. 670; *Beckett* v. *Bilborough*, 8 Hare 188.

(*f*) *Bunten* v. *Barclay*, 1854, 16 D. 1002.

(*g*) *Bagshaw* v. *East Union Rail. Co.*, 7 Hare 114.

(*h*) *Madrid and Valencia Rail. Co.*, 16 E. Jur. 809.

subscribed by such persons as agree to become shareholders when the special act has been obtained. This agreement contains a statement of the nature of the undertaking, the amount of contemplated capital, and the number of proposed shares. It also generally contains the appointment of a managing committee or other office-bearers *ad interim*, a law-agent, engineer, etc. No scrip-certificates are issued, the only evidence of being entitled to receive shares being the entry to that effect in the deed of agreement.

When the special act has been obtained, the subscribers to the agreement become shareholders by being registered; the subscription to the agreement in this case creating a contract, by virtue of which both the intending shareholder and the company can compel registration.

Conditions of contract must be fulfilled by the company.

But it must be observed, that the power of the company to compel registration of scripholders, allottees, or subscribers, rests entirely on the contract, however entered into, whereby the applicant undertook to accept of so many shares in a company created for certain purposes, and of a certain description. Any change, therefore, in the objects or character of the company, by which it is made to differ in essentials from that projected, and in reference to which the contract was made, will deprive the company of the power to enforce registration (*a*).

This sometimes waived in the contract.

But from necessity, or expediency, the subscribers to undertakings which are to be formed under charter or special act generally confer great powers on the promoters to alter or modify the scheme, to meet the views of the Crown or the Legislature; so that, though the company, when incorporated, may greatly differ from the original conception, the subscribers can seldom take advantage of this circumstance to escape from being registered as shareholders (*b*).

Effect of special act.

Sometimes it happens that the special act renders persons *nominative* shareholders in a company which is essentially different

(*a*) *Duke* v. *Andrews*, 2 Ex. 290; *Fox* v. *Clifton*, 6 Bing. 776; *ex parte Rye*, 3 E. Jur. N. S. 460; *Galvanized Iron Co.* v. *Westoby*, 8 Ex. 17; *Sclanders* v. *Kennedy*, 1833, 11 S. 279; *Learmonth* v. *Adams and Co.*, 1831, 9 S. 787.

(*b*) *Fife and Kinross Ra. Co.* v. *Gentle*, 1861, 23 D. 891; *Midland R. Co.*, 16 M. and W. 804, and 5 Ra. Ca. 76; *Nixon* v. *Brownlow*, 2 H. and N. 455; *Norman* v. *Mitchell*, 5 De G. M. and G. 648.

from that contemplated in the prospectus, or that they had covenanted to join. There does not appear to be any remedy short of a new application to the Legislature in such a case (*a*).

It must be observed, moreover, that in all cases where a subscriber seeks to be relieved from his liability to be made a shareholder on the ground that some condition has not been fulfilled, or that some variance exists between the company as formed and that contemplated at the time of his subscription, he must show that the condition or variance is of substantial importance, and touches the essence of the contract (*b*).

To convert the subscriber into the shareholder, all formalities must be observed.

As a general rule, it is only when all the regulations and formalities required by the constitution of the company have been fulfilled, that subscribers are to be deemed shareholders. Thus, where in a common law company it is a condition that the contract or articles of association shall be signed by intending partners, the partnership relation is not formed until this has been done (*c*).

This rule must be equitably understood.

This rule, however, is a purely equitable one. Hence it will only receive effect where it is pleaded by the party for whose behoof the formalities alleged to have been disregarded were introduced (*d*), though in such a case its enforcement will be very rigid (*e*). But it cannot be taken advantage of by the party who has neglected to observe the formalities, whether that party have been the company (*f*) or the alleged partner (*g*). It is in virtue of this principle that companies are estopped from calling in question transactions by which parties have been entered on the register and treated as

Waiver.

(*a*) *Reid* v. *Edinburgh Gas Light Co.*, 1823, 2 S. 257. See *Kidwelly Canal Co.*, 2 Price 93; *Spackman* v. *Lattimore*, 3 Giff. 16; *Bo'ness Canal Co.* v. *M'Alpine, Fleming, and Co.*, 1791, Hume 751.

(*b*) *Turner* v. *Mollison*, 1833, 11 S. 669; *Caledonian Dairy Co.* v. *Campbell*, 1834, 12 S. 394; *MacAlister* v. *Alexander*, 1831, 15 S. 1061, aff. 7 May 1839, M'L. and Rob. 353.

(*c*) *Ward* v. *Matheson*, 1829, 7 S. 409; *Learmonth* v. *Adams and Co.*, 1831, 9 S. 787; *New Brunswick R. Co.* v. *Muggeridge*, 4 H. and N. 160. See *Irish Peat Co.* v. *Phillips*, 1 B. and Sm. 598; *Moss* v. *Steam Gondola Co.*, 17 C. B. 180.

(*d*) *Weatherly* v. *Turnbull*, 1824, 3 S. 61; *East Lothian Bank* v. *Turnbull*, *ibid.* 63; *MacAndrew* v. *Robertson*, 1828, 6 S. 950; *Thomson* v. *Fullarton*, 1842, 5 D. 379; *Robertson* v. *Thom*, 1848, 11 D. 353.

(*e*) *Sir James Gibson Craig* v. *Aitken*, 3 Feb. 1848, 10 D. 576.

(*f*) *Weatherly* v. *Turnbull*, 1824, 3 S. 61 and 63; *Drummond* v. *Thomson's Trust.*, 1834, 12 S. 620.

(*g*) *MacAndrew* v. *Robertson*, 1828, 6 S. 950; *Turnbull* v. *Allan and Sons*, 1833, 11 S. 487, aff. 1834, 7 W. S. 281. See also *Sir J. Gibson Craig* v. *Aitken*, 1848, 10 D. 576.

shareholders, without observance of the proper formalities, when it is clear that these formalities have been waived by the directors (*a*). And, in like manner, a party who has by his conduct evidently waived the formalities required according to the constitution of the company to render him a shareholder, will be estopped from pleading such irregularity, either when sued by the company for calls, or sought to be made a contributory on its being wound up (*b*).

Non-application of the doctrines of *quasi* partnership.

The doctrines by which persons who are not properly members are held in private partnerships to be liable to the public for the liabilities of the concern, viz. those of '*holding out*,' implied agency, sharing profits, all of which are generally covered by the phrase *quasi* partnership, have little or no application in public companies.

Provisions for registration of members in incorporated companies.

In companies formed by registration under the Act 1862, the names of the members originally forming the company appear in the memorandum or articles of association, and that of every member for the time being appears on the register of members which the company is required to keep. In companies formed under the Letters Patent Act, a return must be made to the Lord Clerk Register or his deputy of the names of all the members, and of such changes of membership as occur. In chartered companies, similar means are always provided by the charter for ascertaining the names of members; and in companies formed by special act, the Companies Clauses Act requires that a register of shareholders be kept, from which it may appear who at any given time are members.

Case of common law companies.

In the case, again, of common law companies, when their membership was numerous enough to distinguish them from private firms, it was always the practice to provide in the articles of association or deed of settlement that a register of the shareholders should be accurately kept; and in the few cases where common law companies with a membership not exceeding twenty persons (beyond which they are illegal) still exist, the same practice ought to be, and generally is, adopted.

Effect of registration of

It does not, however, follow that the register of common law

(*a*) *Bargate* v. *Shortridge*, 5 House of Lords Cases 297. See cases in the two preceding notes.

(*b*) *Forth Mar. Insur. Co.* v. *Burnes*, 1848, 10 D. 689, aff. 1849, 6 Bell 541; *New Brunswick and Canada R. Co.*, 4 H. and N. 160; *Birmingham and Bristol R. Co.*, 1 Q. B. 256; *Cromford R. Co.*, 3 Y. and J. 80; *Sheffield R. Co.*, 7 M. and W. 574.

companies is to be taken as conclusive evidence of membership or non-membership in a question with the public. On the contrary, it is easy to conceive cases where, from inadvertence or fraudulent design, the register might be a most erroneous test of membership. All that can be said is, that the register, if apparently fairly kept, ought to be received as *prima facie* evidence, but that it will still be open to be redargued by counter evidence of facts and circumstances. As before mentioned, the public, in the case of unincorporated associations, have no public register to examine before transacting with the concern so as to ascertain who really are and who are not members. The private register is not intended for their inspection. It therefore seems just, that when persons by their conduct lead the public creditor to believe that they are members of unincorporated associations, they should be found liable as in simple partnership, unless it can be shown that the creditor had access to and inspected the private register before entering into the contract on which he sues. Yet in a question between the company and its members, the private register, particularly if kept in accordance with the formalities and regulations of the company, will generally be held to be conclusive, unless it can be shown that the name of a party who denies membership had been placed on the register without authority (*a*).

shareholders in common law companies.

Even as regards incorporated companies, unless the Act of Parliament or other instrument of erection plainly renders the register conclusive evidence, the mere fact of a party's name appearing therein will only amount to *prima facie* evidence of membership, which may still be redargued by counter proof. No general rules upon this subject can here be laid down, but it will be considered in detail when treating of each class of these associations.

Effect of registration in incorporated companies.

PROMOTERS.

Under this term are included provisional or *interim* directors, provisional committee-men, and in general all such as have the direction, conduct, management, or superintendence of the affairs of an inchoate company. Very important and difficult questions

Promoters.

(*a*) *Blackburn* v. *Finlay*, 1848, 10 D. 590; and *Blackburn* v. *Buchanan*, 1818, 20 Jur. 199.

have frequently arisen on the relation of the promoters to each other, to the allottees, to the company when formed, and to the public. Such questions, however, generally admit of an easy solution, if we be careful to keep in mind the true character of promoters—what they *are not*, and what *they are*.

Promoters may be regarded as persons who have agreed to assist at the formation of a company, and who expect to be remunerated by the success of their scheme when brought into operation; who are not bound to themselves or the public by any implied contract of partnership, but are liable for their individual acts and engagements only; and who, as they are not the company, have no power to bind it by acts or engagements before it comes into existence (*a*). These principles have been evolved and illustrated by a great variety of cases, both in this country and in England.

Promoters are not partners.

Promoters of companies are not partners, either in relation to themselves or the public. They cannot, it is obvious, be partners in the company of which they are promoters, for it has not yet come into being; neither can they be said to be partners in the endeavour to bring such company into existence, for that would be to confound the agreement to enter into partnership with the contract itself. It was at one time indeed supposed in England, on the authority of *Holmes* v. *Higgins* (*b*), *Lucas* v. *Beach* (*c*), and one or two similar cases (*d*), that in some respects promoters were to be considered partners. But these decisions either proceeded upon specialties, or have since been overruled; and the principle that promoters are in no case to be deemed partners, has been conclusively settled by a series of authorities which fix the law on this subject (*e*). In Scotland this principle appears never to have been doubted, and it received the solemn sanction of the Supreme Court in the well-known cases of *Campbell* v. *Lauder's Representatives and Others* (*f*), and *Johnston* v. *Scott* (*g*), the former of which was affirmed in the House of Lords (*h*) 19 Feb. 1857.

Promoters do not bind each other by acts or agreements.

One of the most important consequences of this doctrine is, that as the promoters are not partners, they do not possess the power of

(*a*) Wordsw. 24.
(*b*) 1 B. and C. 74.
(*c*) 1 Man. and Gr. 417.
(*d*) *Bartlett* v. *Lambert*, 10 E. Jur. 416, 4 Ra. Ca. 308.
(*e*) Lindley 26–7.
(*f*) 1852, 15 D. 117.
(*g*) 1860, 22 D. 393.
(*h*) 1857, 19 D. 12, H. L., 2 Macq. 499.

binding each other by implied agency; but are liable only for their individual acts and engagements, or for proceedings of their co-promoters, which they have afterwards plainly homologated. Of this the English cases of *Reynell* v. *Lewis* (*a*), and *Wyld* v. *Hopkins* (*b*), may be referred to as illustrations. In the former of these, an action was brought against a provisional committee-man by an advertising agent for the cost of advertisements, some of which were necessary to enable the company to apply to Parliament for their special act; and in the latter a geographer sued a provisional committee-man for the expense of work done in making maps, plans, and sections of the projected line of railway. In both cases it was held that the defendants were not liable, inasmuch as they had not individually given the orders; and not being partners, could not be bound by the acts of their co-promoters. In the case of *Capper* (*c*), it was stated by Lord Cranworth, V. C., that 'if they (the promoters) incur expense in endeavouring to effect their object, and seek to render any one liable to any part of that expense, the question always is, whether the person whom they seek to charge did or did not authorize them to incur that expense on his account, or did or did not agree to indemnify them if they incurred it on their own account.' The English case of *Norris* v. *Cottle* (*d*), House of Lords, may also be referred to in illustration. In this case, the whole subject was discussed, the previous cases were reviewed, and the law was stated to be as follows: That 'the committee-man was not liable for the acts of his fellows,—the law not implying from his mere consent to be a provisional committee-man, either an authority from him to make contracts by the committee-man with other persons, or by the solicitors with the committee, or to the solicitors to make contracts on behalf of the committee, but merely a promise to act with these others to carry the scheme into effect.'

The same principle has been given effect to in this country, as will appear from the case of *Campbell* v. *Lauder's Representatives* (*e*), in which the English cases were specially referred to. There an

(*a*) 4 R. Cases 351, and 15 M. and W. 517.

(*b*) 4 R. Cases 351, and 15 M. and W. 517.

(*c*) 1 Sim. N. S. 178.

(*d*) 6 R. Cases 317 (1850).

(*e*) 1852, 15 D. 117.

action was brought by the solicitors employed by the provisional committee of a projected railway company. Their employment had been recognised by several members of committee, but repudiated by the others. The action concluded that the committee-men were jointly and severally liable for the pursuers' accounts. It was dismissed on the plea of want of relevancy, in respect that employment was not averred to have been authorized, or adopted and homologated by each of the defenders; and that although it was set forth that they had all allowed their names to be published to the world as members of the provisional committee, that they had been warned to attend the meetings of committee, and that, in regard to one of them, his name had been put on the committee at his own request, and that he had for some time attended meetings and had advised and acted as freely as any of the other committee-men, yet that it was not averred that he had been present at any meeting where the employment of the pursuers had been recognised. On appeal, the House of Lords affirmed the judgment of the Court of Session (*a*), the Lord Chancellor remarking that the case of *Bright* v. *Hutton* (*b*) had settled the law on this point.

To the like effect was the more recent case of *Johnston* v. *Scott*, 18 Jan. 1860, already referred to. There several members of a provisional committee were sued for the expense of preparing plans, etc., 'being work done by the pursuers for behoof of the defenders on their employment either directly or through others for whom they were and are responsible.' The Lord Justice-Clerk Inglis stated, that whatever doubts might at one time have been entertained in England, it had always been the law of Scotland, 'that a provisional committee is not a partnership to the effect that one member can be held to be the mandatary of another, or that a majority can bind a minority.' And the Court unanimously held, in conformity with this principle, that a member of a provisional committee is not liable for obligations, incurred at meetings from which he was absent, even though they had been entered into in the ordinary prosecution of the undertaking; and that the minutes

(*a*) This case is reported under name of *M'Ewan* v. *Campbell*, 19 D. 12, H. L., 2 Macq. 499.

(*b*) 1852, 3 House of Lords Cases 341.

of a meeting of a provisional committee are not the writ of a member who does not sign them.

Promoters not liable for acts done previous to their becoming such.

From this principle it necessarily follows *a fortiori*, that 'promoters' are in no case liable for acts done or obligations contracted before they became promoters, unless they have plainly homologated such transactions. No question of this kind appears hitherto to have occurred in Scotland; but in England they have been very numerous (*a*). Nor has it been found sufficient in that country to infer homologation, that goods which had been ordered prior to a man's becoming a promoter, had been delivered subsequently to that event (*b*). In one case, indeed, the goods were both ordered and delivered subsequently to the defendant joining the committee; but still liability was successfully resisted, on the ground that he had not individually been concerned in the transaction (*c*).

Acts and admissions of co-promoters not evidence against each other.

From the same principle that co-promoters are not partners, it follows that the acts, letters, or statements of one promoter are not evidence against another, unless they can be shown to have been specially authorized; and the same rule applies to admissions as to liability made by one promoter, which can have no effect to bind others, unless such admissions have been made under their special authority. These rules are necessary deductions from the principle under consideration, and they have been established and illustrated by numerous English decisions (*d*). In the Scotch case of *Johnston* v. *Scott, etc.*, already mentioned, the opinions of the judges plainly indicate that upon this point the law of Scotland is the same with that of England.

Promoters may render themselves liable for each other's acts by special authority.

But while it may now be held as settled law, that no implied agency exists between promoters such as exists between partners, it must be observed that it is quite possible for promoters to authorize each other to act as mutual agents; and that this may be done either by giving a special authority for each act, or by conferring a general authority for all acts in the line of business. Such authority may

(*a*) *Bremner* v. *Chamberlayne*, 2 Car. and Kir. 560; *Kerridge* v. *Hesse*, 9 C. and P. 200; *Newton* v. *Belcher*, 12 Q. B. 921; *Whitehead* v. *Barron*, 2 Moo. and Rob. 248.

(*b*) *Beale* v. *Mouls*, 10 Q. B. 976.

(*c*) *Beech* v. *Eyre*, 5 Man. and Gr. 415.

(*d*) *Drouet* v. *Taylor*, 16 C. B. 671; *Burnside* v. *Dayrell*, 3 Ex. 224; *Watson* v. *Charlemont*, 12 Q. B. 856; *Newton* v. *Belcher*, 12 Q. B. 921; *Newton* v. *Liddiard*, 12 Q. B. 925; *Rennie* v. *Wynn*, 4 Ex. 691.

be proved not only by written mandate, but also by facts and circumstances. This was distinctly laid down by the Court of Exchequer in the English cases of *Reynell* v. *Lewis* (*a*), and *Wyld* v. *Hopkins* (*b*). And reference may also be made to the other English cases of *Doubleday* v. *Muskett* (*c*), *Braithwaite* v. *Skofield* (*d*), and *Burls* v. *Smith* (*e*), in which it was held, that if promoters pass resolutions that work shall be done or goods supplied, they authorize whatever may be done in pursuance of such resolutions, and render themselves personally liable.

Promoters may render themselves *correi debendi.*

Though, as we have seen, promoters are not partners, yet if in any of the ways mentioned above two or more of them have rendered themselves joint obligants to a third party, and one of them has been compelled to make payment of the sums for which they were jointly liable, such promoter is entitled to relief against all the other co-obligants. This has been settled in England by a series of decisions. In the case of *Boulter* v. *Peplow* (*f*), three provisional committee-men hired rooms for a projected company. The rent not being paid, the landlord sued the three committee-men. Two of them allowed judgment to go by default, but a verdict was obtained against the third, who was compelled to pay damages and costs. He was found entitled to bring an action for contribution to the extent of one-third of what he had paid against each of his co-obligants. In like manner, in *Batsed* v. *Hawes*, and *Batsed* v. *Douglas* (*g*), the promoters of a projected railway company employed an engineer, who afterwards recovered payment against one of them. In an action for contribution at the instance of the latter against the other joint obligants, he was found entitled to recover. *Edgar* v. *Knapp* (*h*), *Mant* v. *Smith* (*i*), and *Prole* v. *Masterman* (*k*), may also be referred to as illustrating this principle. Though no case exactly in point appears to have occurred in this country, yet, from the general principles of our law, there seems no reason to doubt that the same doctrine would be given effect to. In our law the promoters who had incurred the joint obligation would

(*a*) 4 Ra. Ca. 351.
(*b*) 15 M. and W. 517, and 4 Ra. Ca. 351.
(*c*) 7 Bing. 110.
(*d*) 9 B. and C. 401.
(*e*) 7 Bing. 705.
(*f*) 9 C. B. 493.
(*g*) 2 E. and B. 287.
(*h*) 7 Jur. 583, C. P.
(*i*) 4 H. and N. 324.
(*k*) 21 Beav. 61.

be termed *correi debendi*, and would incur a joint and several liability.

Promoters not impliedly liable to each other for services.

Though promoters are not partners, yet as they are all engaged in the prosecution of a common design, from the successful issue of which they expect to be mutually benefited, they have no claim against each other for services which they may have rendered in furthering their common enterprise, or bringing the company into existence. This has been settled in England by the cases of *Holmes* v. *Higgins* (*a*), *Wilson* v. *Curson* (*b*), *Milburn* v. *Codd* (*c*). But this being a mere presumption, will not avail against a specific contract or provision to the contrary. Hence it has been decided in England, that when promoters employ any one professionally, he will be entitled to remuneration, even though he afterwards becomes an allottee of shares (*d*).

This may be elided by express provision.

Promoters have no claim against the company when formed.

As promoters look for the reward of their exertions to the successful formation of the company, it may be unnecessary to state that they have no implied claim against the company when formed for what they may have done prior to that event. This, however, may be elided by the insertion of a clause in the special act or other instrument of constitution, providing for the remuneration of those who have expended their services in the formation of the company. See as to this the English cases of *Carden* v. *General Cemetery Co.* (*e*), *Tilson* v. *Warwick Gas Co.* (*f*), *Clowes* v. *Brettell* (*g*), *Hitchins* v. *Kilkenny R. Co.* (*h*).

Duties and liabilities of promoters to the public and the future company.

However loosely promoters may be associated together, still, by holding themselves out to the world as seeking to bring into existence a company for certain purposes, in support of which they seek public assistance, they virtually enter into an implied contract with the public, that whoever may be induced to subscribe for shares will find their representations substantially correct, and that they will not seek to make profit at the expense of the future company. Hence it has been decided in England, that where a person, by false and fraudulent representations, has been induced to subscribe

Liability for misrepresentation.

(*a*) 1 B. and C. 74.
(*b*) 15 M. and W. 532.
(*c*) 7 B. and C. 419.
(*d*) *Lucas* v. *Beach*, 1 Man. and Gr. 417; *Caldicott* v. *Griffiths*, 8 Ex. 898; *Barnett* v. *Lambert*, 10 E. Jur. 416, and 4 Railway Cases 308.
(*e*) 5 Bing. N. C. 253.
(*f*) 4 B. and C. 962.
(*g*) 10 M. and W. 506.
(*h*) 9 C. B. 536.

to a company in the course of formation, he can maintain an action against any of the promoters who may have caused such representations to be published (*a*); and that it is not necessary to prove any direct communication between the plaintiff and the defendants (*b*).

Liability of promoters to return deposits.

In virtue of this contract with the public, promoters are bound to apply deposits for the purposes only for which they were made. Hence, in the case of abortive companies, it has been held that the promoters were not entitled to retain any portion of the deposits or subscriptions, as having been laid out in expenses incurred in attempting to start them. See the case of *Nockels* v. *Crosby* (*c*), which is valuable as containing the judgment of Littledale, J., upon this point, and numerous other cases noted below (*d*). If, however, it appears from the contract, or subscribers' agreement, that the deposits were intended to be applied to cover the expenses necessary for starting the company, they will not be held returnable, if *de facto* they were employed in this manner (*e*). But it will be observed, that as promoters are not partners, and consequently not liable for the acts of each other, the action for recovery of deposits on any of the grounds above referred to must be directed against such of them as really received the money, or authorized its being paid into a particular bank (*f*).

Promoters cannot benefit at the expense of the company.

Upon the same principles, it follows that promoters cannot make any profit by transactions into which they enter on behalf of the future company. In the case of *Hichens* v. *Congreve* (*g*), the three principal promoters of a mining company purchased the lease of a mine at £10,000, and afterwards re-sold it to the company for £25,000. They were compelled to pay into court the balance that remained in their hands.

Upon this subject, the English cases of *Fawcett* v. *Whitehouse* (*h*), and *Beck* v. *Kantorowicz* (*i*), may be consulted with advantage.

(*a*) *Gerhard* v. *Bates*, 2 E. and B. 476.

(*b*) See *Bedford* v. *Bagshaw*, 4 H. and N. 538; Lindley 726.

(*c*) 3 B. and C. 814.

(*d*) *Clarke* v. *Chaplin*, 1 Ex. 26; *Mowatt* v. *Londesburgh*, 3 E. and B. 307; *Vollans*, 1 Ex. 20; *Steadman*, 15 M. and W. 587; *Willey*, 3 Ex. 211; *Walstab* v. *Spottiswoode*, 15 M. and W. 501.

(*e*) *Garwood*, 1 Ex. 264; *Vane* v. *Cobbold*, *ibid.* 798; *Baird* v. *Ross*, 2 M'Queen 61; *Jones*, 2 Ex. 52; *Clements*, 1 Ex. 268. See Lindley 66.

(*f*) *Watson* v. *Charlemont*, 12 Q. B. 856; *Drouet* v. *Taylor*, 16 C. B. 671; *Burnside* v. *Dayrell*, 3 Exch. 224.

(*g*) 1 R. and M. 150.

(*h*) 1 R. and M. 132.

(*i*) 3 K. and J. 230.

In both these cases, companies were got up for the purpose of working mines, and the promoters contracted for the purchase of the mines, on what was represented as favourable terms. But after the formation of the companies, it was discovered that a private agreement existed with the sellers of the mines, whereby the promoters received a part of the purchase price as a *premium* or *bonus* for carrying through the transaction. In both cases the Court held that the promoters were to be regarded as *trustees* for the company, and as such liable to account to it when formed, for any advantages they might have received in the management of its affairs during its inchoate state.

Company not bound by acts of its promoters.

Although, as we have just seen, promoters are in some respects to be regarded as trustees for the future company, yet this must be understood only in a passive sense, or as the exponent of the principle that they cannot be benefited at the expense of the future company. So far from having any active title as trustees, it may now be laid down as the general rule, that promoters have no power by their acts and deeds to bind the company when it comes into existence. This doctrine may be rested on the technical ground, that no corporate body can undertake obligations until it has a legal being; but its intrinsic justice and propriety become more apparent when we reflect that the public are led to become shareholders on the faith of the instrument, whether deed, charter, or special act, by which the company is constituted; and if they were to be held bound by stipulations or liabilities other than those appearing on the face of such instrument, the most iniquitous consequences might ensue.

The law of Scotland, when properly understood, appears to have given full effect to this equitable doctrine. Thus, in the case of the *Monklands Railway Company* v. *The Glasgow, Airdrie, and Monklands Railway Company* (*a*), it was held that an agreement entered into by the provisional committee of a contemplated railway company to lease the line was not binding upon the company when incorporated by the special act—the act containing no such provision. At a subsequent period, impressed seemingly with the hardship arising in particular cases, the Court was led to relax the stringency of the rule, to an extent that was not altogether com-

(*a*) 11 D. 1395 (1849).

patible with public safety or confidence. Thus, in the case of *The Trustees of the Harbour of Helensburgh* v. *The Caledonian and Dumbartonshire Railway Company* (*a*), it was held that the company when formed was bound to implement the contracts which had been entered into by its provisional committee, when these had for their object the interests of the company in the matter contemplated by the special act, when without them the act would not have been obtained, or when the contracts were such that the company, if in existence, could competently have gone into them. In that case, the stipulation sought to be enforced was in fact the price at which the promoters obtained the support of the pursuers to their projected scheme. The case of *Rutherford* v. *The North British Railway Company* (*b*) was soon after decided on the same grounds, and avowedly on the authority of the *Helensburgh* case. There a body of road trustees had been got to withdraw their opposition to the bill of a projected railway company, by the promoters agreeing to pay a certain proportion of liabilities for which the trustees were responsible. The bill passed, and the undertaking was purchased by another company. The Court held that the purchasing company was bound to implement the obligations undertaken by the promoters of the first company.

Similar decisions had been also given in England. The most celebrated of these was the case of *Edwards* v. *The Grand Junction Railway Company* (*c*), in which it was held that a company was bound by an agreement made with its promoters, in consequence of which opposition to its special act had been withdrawn. But the authority of the Scotch cases, and of this as well as of all the other English cases proceeding upon a similar principle, must now be held to be overruled by the judgment of the House of Lords, reversing the finding of the Court of Session in the *Helensburgh* case (*d*), on the broad ground that those who take shares on the faith of a company's special act cannot be subjected to any liabilities not embodied therein. The same decision had been given by the House of Lords in the previous English case of *Preston* v. *Liverpool and Manchester Railway Company* (*e*). In both these

(*a*) 1852, 15 D. 148.
(*b*) 1855, 17 D. 1110.
(*c*) 1 M. and Cr. 650.
(*d*) 19 D. H. L. 6; 2 Macq. 391 (1856).
(*e*) 5 House of Lords Cases 605.

cases the decision in the case of *Edwards* was founded upon, and in both its authority was disregarded (*a*).

It is, however, to be observed, that the expression of Lord Chancellor Cranworth, in giving judgment in the *Helensburgh* case, must be taken in a reasonable sense; for his Lordship afterwards remarks, that if the agreement with the promoters, 'though not incorporated in the Act, had regard to something, the doing of which fell within the powers and objects of the Act,' a different decision might be expected.

Company may be bound by homologation.

The company, when formed, may of course always render itself liable for the acts or engagements of its promoters by homologation. Thus, in the subsequent English case of *Williams* v. *The St George's Harbour Co.* (*b*), this element was made the ground of decision. There an owner of land agreed to withdraw his opposition to the bill, in consideration of the promoters undertaking that the company should purchase his land on certain terms. On obtaining the special act, the company refused to fulfil the contract made with its promoters, but was compelled to do so, in respect that it had *recognised* the validity of the contract by allowing judgment to be entered up against itself in an action for its alleged breach. There can be little doubt that effect would be given to this principle were a similar case to occur in this country.

General rule as to liability of company for acts of promoters.

The following may therefore be stated as the general result of the decisions hitherto pronounced. A company is not bound by the acts, stipulations, or engagements of its promoters, unless these be distinctly set forth in its special act or other instrument of constitution, be obviously implied therein, or have been in some unmistakeable manner homologated or adopted by the company after its formation.

When company not bound, the promoters remain liable.

It need scarcely, perhaps, be remarked, that though the company when formed may not be found liable for implement of the engagements of its promoters, this has no effect to release the promoters, or such of them as have incurred liability (*c*).

(*a*) See Lindley 321, whose views on this subject are somewhat different from those submitted in the text. But see *Spackman* v. *Lattimore*, 3 Giff. 16.

(*b*) 2 De G. and I. 547; S. C., 24 Beav. 339. See *Browning* v. *Grt. Cen. Min. Co.*, 5 H. and N. 856.

(*c*) *Cal. and Dumb. R. Co.*, *ut supra*.

CHAPTER XI.

FORMATION OF REGISTERED COMPANIES UNDER 'THE COMPANIES ACT, 1862,' 25 AND 26 VICT. C. 89.

Number of members.

SINCE the second day of November 1862, no company, association, or partnership consisting of more than ten persons can be formed for the purpose of carrying on the business of banking, unless it is registered as a company under 'The Companies Act, 1862,' or is formed in pursuance of some other Act, or of letters patent; and no company, association, or partnership consisting of more than twenty persons, can be formed for the purposes of mercantile gain, unless so registered, or formed under some other Act, or by letters patent, or in England be a mining company within the jurisdiction of the Stannary Courts of Cornwall and Devonshire (sec. 4). But any seven or more persons associated for a lawful purpose may, by registration in accordance with the provisions of the Act, form an incorporated company (sec. 6).

The company may be formed with or without limited liability; and in the former case, the limitation may be either by shares or by guarantee (secs. 6, 7).

Three kinds of companies.

The statute therefore contemplates three kinds or classes of associations, viz.:—

1. Companies limited by shares.
2. Companies limited by guarantee.
3. Companies with unlimited liability.

It is important to keep these distinctions in view, as they materially affect the formation and the subsequent management of the company.

I. COMPANIES LIMITED BY SHARES.

Companies limited by shares.

These companies proceed on the principle of limiting the liability of the members to the amount (if any) unpaid on their shares. They are formed by a memorandum of association. This instrument must contain,

1. The proposed name, with the addition of the word '*limited.*'

2. The part of the United Kingdom—England, Scotland, or Ireland—where the registered office is to be situated.

3. The objects of the company.

4. A declaration of limited liability.

5. The amount of proposed capital, divided into shares of a fixed amount (secs. 7, 8).

Each subscriber must take at least one share, and must write opposite his name the number of shares he takes (sec. 8). For the form of this instrument, see Form A, Sch. 2. It must bear the same stamp as a deed, and must be signed by every subscriber in presence of and attested by *one* witness at least (sec. 11).

In addition to the memorandum of agreement, there may also be articles of association providing such regulations as the subscribers may deem advisable. These articles must be expressed in separate paragraphs, numbered arithmetically, and may contain all or any of the provisions contained in Table A of Schedule 1. The articles must be printed and stamped, signed and attested in the same way as the memorandum (secs. 14, 16).

If the memorandum of association is not accompanied by articles, and in so far as the articles do not exclude or modify the regulations of Table A, Sch. 1, these regulations, so far as applicable, form the rules of the company (sec. 15).

Banking companies registering as limited by shares, do not attain limited liability in respect of their issue (secs. 182–8).

II. COMPANIES LIMITED BY GUARANTEE.

Companies limited by guarantee.

These companies are based on the principle of having the liability of the members limited to such amount as they respectively undertake to contribute to the assets of the company in the event of its

being wound up (sec. 9). Their memorandum of association *must always* be accompanied with articles of association (sec. 14).

The memorandum consists of four articles, the three first being the same as those in the previous class of companies, and the fourth being a declaration that each member undertakes to contribute a specified amount to the company assets in the event of its being wound up (sec. 9).

The company may or may not have a capital divided into shares (sec. 14).

If it have a capital divided into shares, each subscriber must take at least one share, and must state in the memorandum the number of shares he takes (sec. 14).

The articles of association may adopt all or any of the provisions contained in Schedule 1, Table A, and such others as may be deemed expedient; and if the capital is divided into shares, they must state the amount of capital proposed. If, again, the company has not a capital divided into shares, they must state the number of members, to enable the registrar to determine the fees payable on registration (sec. 14).

If the company have a capital divided into shares, the memorandum and articles of association will take the Form C, Sch. 2; if the company have not a capital divided into shares, the memorandum and articles will assume that of B, Sch. 2.

Banking companies registering as limited by guarantee, do not attain unlimited liability in respect of their issue (secs. 182–8).

III. COMPANIES WITH UNLIMITED LIABILITY.

Companies with unlimited liability.

These companies require in like manner both a memorandum and articles of association (sec. 14).

The memorandum of association contains,

1. The name of the company.

2. The part of the United Kingdom, whether England, Scotland, or Ireland, where the office is to be situated.

3. The objects of the company (sec. 10).

These companies may or may not have a capital divided into shares. If the company has a capital so divided, each member must take at least one share, and must state in the memorandum of asso-

ciation the number he takes (sec. 14). The memorandum of association must always be accompanied by articles of association, which may contain such regulations as are deemed expedient, together with all or any of those in Table A, Sch. 1. In companies with capital divided by shares, they must state the amount of capital proposed; and in companies not having a capital divided by shares, they must state the number of members (sec. 14).

The Act only gives one form for the memorandum and articles of association of unlimited companies, viz. that applicable to companies with a capital divided into shares—Form D, Sch. 2. But the form for such as have not a capital limited by shares appears to be similar to Form B in the same schedule intended for companies limited by guarantee, omitting the 4th section in the memorandum, and making such obvious alterations as the nature of an unlimited company requires, and also adopting such of the articles of Table A, Sch. 1, as may be deemed advisable. The articles of association must state the number of members of the proposed company, in order to determine the fees payable on registration (sec. 14).

GENERAL RULES APPLICABLE TO THE THREE KINDS OF COMPANIES.

Registration of memorandum and articles.

The memorandum and articles of association, when duly stamped, signed, and attested, are, in the case of a Scotch company, delivered to the Registrar of Joint-stock Companies for Scotland, who retains and registers the same. The fees payable to the registrar in the case of companies with a capital divided into shares are those marked in Table B, Schedule 1, or such smaller fees as the Board of Trade may from time to time direct; and in the case of companies not having a capital divided into shares, those in Table C, Schedule 1, or such smaller fees as before (sec. 17).

Memorandum and articles, when properly executed, form a covenant.

The memorandum and articles of association (if any), when stamped, signed, and attested, bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such memorandum and articles a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations

and conditions contained therein, subject to the provisions of the Act (secs. 11–16).

Registration creates incorporation.

Upon registration of the said memorandum and articles (if any), the registrar certifies under his hand that the company is incorporated; and in the case of a limited company, that it is limited. The subscribers of the memorandum, and such other persons as may from time to time become members, are thereupon constituted into a body corporate by the name contained in the said memorandum, and capable forthwith of exercising all the functions of an incorporated company, having perpetual succession and a common seal, with power to hold lands, and with liability limited or unlimited (*a*) on the part of the members, as the case may be (secs. 17 and 18).

The registrar's certificate of incorporation is conclusive evidence of the statutory provisions having been complied with (sec. 18).

Alterations after registration.

After registration, no alteration on the memorandum can be made, except in the two following cases:—

1. Companies limited by shares may so far modify their memorandums of association (sec. 12), if authorized to do so by their regulations as originally framed, or as altered by special resolution (secs. 50 and 51), as to increase the capital by issue of new shares, to consolidate and divide the capital into shares of larger amount, and to convert paid-up shares into stock (sec. 12).

2. Any company may, with the sanction of a special resolution and the approval of the Board of Trade, change its name; and the registrar then enters the new name, and issues a certificate of incorporation altered to meet the circumstances (sec. 13). Articles of association may be changed by special resolution, subject to the provisions of the Act and the conditions of the memorandum of association (secs. 50 and 51).

Identity of name.

No company can be registered under a name identical with that of a subsisting company, or so closely resembling it as to be calculated to deceive. Where this is the case, it must be altered with the sanction of the registrar (sec. 20). Every member is entitled to receive a copy of the memorandum of association and of the articles (if any) on payment of one shilling, under a penalty of one pound (sec. 19).

(*a*) Unlimited companies are, properly speaking, only *quasi* corporations.

APPLICATION OF THE ACT TO COMPANIES ALREADY EXISTING.

Not only does the Act apply to companies formed under its provisions; but companies already existing, whether corporate or unincorporate, may, with some exceptions, obtain by registration the benefits of its provisions.

Application of the Act to existing companies.

In the statutory provisions applicable to this matter, the expression Joint-stock Companies Acts frequently occurs. Under this expression are included the Joint-stock Companies Acts of 1856 and 1857 (19 and 20 Vict. c. 47, and 20 and 21 Vict. c. 14), 'The Joint-stock Banking Companies Act' of 1857 (20 and 21 Vict. c. 49), and the Act to enable joint-stock banking companies to be formed on the principle of limited liability (21 and 22 Vict. c. 91); but it does not apply to 8 Vict. c. 110, intituled 'An Act for the Registration, Incorporation, and Regulation of Joint-stock Companies' (sec. 175).

Companies previously formed and registered under the 'Joint-stock Companies Acts,' as limited companies, when registered under the present Act, are deemed to be companies limited by shares (except as to the provision of Table A); and companies other than limited, as unlimited companies. The power to alter regulations by special resolution given in the present Act is declared to extend to any provisions contained in the Table marked B annexed to 'The Joint-stock Companies Act, 1856,' and to any regulations as to amount of capital, or its distribution into shares, even though these should be contained in the memorandum of association (sec. 176). The present Act applies to companies registered but not formed under the former Joint-stock Companies Acts, in the same way as to companies registered but not formed under its provisions (sec. 177). Whenever reference is made to the date of registration, it means the date at which the company was registered under the former Acts (secs. 176–7).

General rule as to registration.

As a general rule, every company in existence prior to Nov. 2, 1862, including companies registered under 'The Joint-stock Companies Acts,' any company formed subsequently to that date by special act or letters patent, and any company within the jurisdiction of the Stannaries, or otherwise duly constituted by law,

provided it consist of seven or more members, may register under the present Act as an unlimited company, as a company limited by shares, or as a company limited by guarantee. The fact that registration has been resorted to for the purpose of winding up, is no objection to its validity (sec. 180).

Limitations of the rule.

The application of this general rule is, however, subjected to the following regulations:—

1. No company can register when the liability of its members has been limited by special act or letters patent, unless it be a joint-stock company in the sense of the Act.

2. No company formed with limited liability by special act or letters patent can register as an unlimited company, or as a company limited by guarantee.

3. No company that is not a joint-stock company in the sense of the Act can register as a company limited by shares.

4. To warrant registration, the resolution of a majority of the members at a general meeting specially called is necessary.

5. To warrant an unlimited company to register as a limited company, the majority must consist of at least three-fourths.

6. When a company is about to be registered as limited by guarantee, the consent to registration must be accompanied by a resolution that each member undertakes to contribute towards the liabilities of the company to a certain specified amount.

Majorities are to be computed with reference to the number of votes to which each member is entitled according to the regulations of the company (sec. 179).

Definition of joint-stock company in the sense of the Act.

In so far as concerns the purposes of registration, the expression 'Joint-stock Company' is defined in the Act to mean a company having a permanent paid-up or nominal capital of fixed amount, divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of such shares or stock, and no other persons (sec. 181). Such companies, on being registered with limited liability, are deemed companies limited by shares (sec. 181).

Banking companies.

No banking company issuing notes can attain limited liability in respect of such issue; but though registered as limited companies, and *de facto* so in other respects, they continue to subject

their members to unlimited liability for the whole amount of their issue (secs. 182 and 188).

Prerequisites to registration of existing joint-stock companies.

Previously to the registration of any existing joint-stock company, there must be delivered to the registrar the following documents:—1. A list showing the names, addresses, and occupations of all persons who, on a day named not more than six clear days before the day of registration, were members of such company, with the addition of the shares held by such persons respectively, distinguishing in cases where the shares are numbered, each share by its number: 2. A copy of the special act, charter, letters patent, deed of settlement, contract of copartnery, cost book regulations, or other instrument constituting or regulating the company: 3. Joint-stock companies intending to register as limited companies, must, in addition to the above, lodge a statement specifying their nominal capital and the number of shares; the number of shares taken, and the amount paid on each; the name of the company, with 'limited' as the last word thereof; and in the case of companies to be limited by guarantee, the resolution declaring the amount of the guarantee (sec. 183).

Prerequisites to registration of existing companies, other than joint-stock companies.

Previously to the registration of existing companies other than joint-stock companies in the sense of the Act, there must be delivered to the registrar a list showing the names, addresses, and occupations of the directors or other managers (if any) of the company, a copy of the special act, charter, letters patent, deed of settlement, contract of copartnery, cost book regulations, or other instrument constituting or regulating the company, with the addition, in the case of a company to be limited by guarantee, of the resolution declaring the amount of guarantee (sec. 184).

When the capital of the joint-stock company has been in whole or part converted into stock, the statement to be delivered to the registrar must specify the amount of stock instead of the number of shares, and the names of the persons holding such stock, as in the former case (sec. 185).

Authentication of documents.

The lists and statements required to be delivered to the registrar must be authenticated by a declaration of the directors, or any two of them, or of any two other principal officers of the company, made in terms of 5 and 6 Gul. IV. c. 62 (sec. 186) (*a*).

(*a*) For form of declaration see Appendix.

The registrar may require such evidence as he thinks necessary to satisfy himself whether the company seeking registration is or is not a joint-stock company in the sense of the Act (sec. 187).

Notice in registration of existing banking companies registering with limited liability.

In the case of existing banking companies intending to register with limited liability, thirty days' previous notice at least must be given of such intention to every customer who has a banking account with the company. Service may be made either personally, or by putting the notice in the post directed to the last known address of the customer. The consequence of not serving such notice, is to render the certificate of limited liability a nullity in all questions between the company and the customer who did not receive due notice (sec. 188).

Exemption from payment of fees.

No fees are exigible for the registration of existing companies not registering as limited companies, or of companies previously limited by Act of Parliament or letters patent (sec. 189).

Certificate of registration incorporates.

When the requisites for registration have been duly complied with, the registrar certifies under his hand that the company applying for registration is incorporated under the Act 1862, and in the case of a limited company that it is limited; and thereupon it is incorporated, with perpetual succession, a common seal, and power to hold lands. Banking companies in Scotland so incorporated are deemed to be incorporated by or under Act of Parliament (sec. 191).

Conclusive evidence that statutory requisites have been complied with.

The certificate of incorporation is conclusive evidence of all the requisites of the statute having been complied with, and that the company is authorized to be registered as a limited or unlimited company. The date of incorporation mentioned in the certificate is the date of incorporation under the Act (sec. 192). This, it will be observed, differs from the date of registration, which, as already mentioned, means the date when that took place under a former Act by virtue of which the company had been originally formed or registered (sec. 177).

Property vests in the corporation.

All property, whether personal or real, and all rights attaching thereto, which belong to the company at the date of registration under the present Act, vest by that registration in the company as a corporation (sec. 193).

Registration does not affect debts previously incurred.

Registration under the Act has no effect on obligations or liabilities previously incurred (194); and all existing actions or suits by or against the company, or the public officer, or any member thereof,

continue in the same manner as if such registration had not taken place. But execution cannot, after registration, issue against the effects of individual members for the company debts; if the corporation property or effects prove insufficient to satisfy the judgment or decree in such actions or suits, the only remedy is an order to wind up (sec. 195).

Effects of registration under the Act.

When an existing company registers under the Act, all provisions contained in its special act, charter, letters patent, deed of settlement, contract of copartnery, or other instrument of formation, including in the case of companies limited by guarantee the resolution declaring the amount of guarantee, are deemed to be conditions and regulations of the company, in the same way as if they were contained in a registered memorandum and articles of association; and all the provisions of the Act apply to the company, and its members, contributories, and creditors, in the same way as if it had been formed under the Act (sec. 196).

Limitation to general rule.

This rule must, however, be taken with the following limitations:—1. Table A, Schedule 1, does not apply to companies previously existing, when they are registered under the Act, unless adopted by special resolution. 2. The statutory provisions as to numbering of shares do not apply to any joint-stock company whose shares are not numbered. 3. No company has power to alter any provisions contained in its special act. 4. No company can alter provisions contained in letters patent without the sanction of the Board of Trade. 5. In the event of the company being wound up, all persons liable for company debts or liabilities contracted prior to registration, and their representatives, may be made contributories. 6. The company cannot alter such provisions contained in the original instrument of its constitution as would, if the company had been formed under the present Act, have been contained in the memorandum of association, and have been unalterable (sec. 196).

This, however, does not affect such powers of altering its constitution or regulations as may be vested in the company by the original instrument of its constitution (sec. 196).

CHAPTER XII.

FORMATION OF COMPANIES BY ROYAL CHARTER AND LETTERS PATENT.

Ancient state of the law.

ACCORDING to the ancient laws of the United Kingdom, associations erected by royal charter could be nothing less than full corporations possessed of all the *naturalia* of a body politic, and in particular of endless endurance and limited liability (*a*). This, which had come to be a fundamental principle of corporation law, affords a striking proof of the sagacity of our ancestors, who at an early period had discovered that associations for carrying on undertakings of a public nature could only work safely and prosperously when they formed bodies whose term of existence was unlimited, and who were something entirely distinct from the varying units of which at any time they might be composed; and that they would never be formed on a scale sufficiently large to ensure successful operation, unless their members were secured against that personal liability which attaches to the members of ordinary copartneries.

Changes.

But in later times, when plausible theories were more regarded than the lessons of experience, these principles came to be overlooked or forgotten; and it was imagined that the benefits of combined action in carrying on public undertakings might be secured, while the fundamental conditions of its successful working were ignored.

6 Geo. IV. c. 91.

Accordingly, in the year 1825 an Act was passed, empowering the Crown to grant charters of incorporation, and at the same time to declare that the persons incorporated should be personally responsible for the debts of the association. The total want of success which attended this piece of legislation, instead of showing the unsoundness of its principle, led in 1834 to the passing of another

4 & 5 Gul. IV. c. 94.

(*a*) See preambles to 6 Geo. IV. c. 1, 4 and 5 Gul. IV. c. 94, and 1 Vict. c. 73; Shaw's Bell's Prin. s. 2177 *et seq.*; and Grant on Corp. pp. 30 *et seq.*

Act, enabling the Crown, without incorporating at all, to confer on a company by means of letters patent certain privileges, such as that of suing and being sued in the name of a public officer. Both these Acts being found unsuccessful, were repealed by the Act of 1837, known as the Letters Patent Act, which is still in force.

7 Gul. IV. and 1 Vict. c. 73.

By this statute many useful provisions are enacted, and the principle of registration is introduced; but in other respects its provisions are characterized by the same unsoundness of principle that proved fatal to the two preceding Acts, inasmuch as it allows associations to be erected into *quasi* corporations with a limited term of duration, and with the members subjected in personal liability for the company debts as in ordinary partnerships—thus permitting associations to come into existence unprovided with those privileges which experience has indicated to be important conditions of successful operation. The Letters Patent Act has accordingly verified the prognostications of practical men; and its main object of creating associations for public undertakings, with limited privileges, has been almost entirely frustrated. Yet it must be examined in a work of this kind, as companies may still be formed under its provisions, and as it has a very important bearing on all corporations now erected by prerogative.

Effects of statute.

All Crown charters are letters patent, the last being the genus of which the former is merely a particular species. But since the passing of the Letters Patent Act a distinction is made between companies incorporated by royal charter and companies privileged by letters patent, the former being proper corporations, the latter being mere privileged partnerships hardly deserving the name of *quasi* corporations.

Distinction between Crown charters and letters patent.

I. CHARTERED COMPANIES.

Companies established by royal charter are proper corporations, and until the passing of the Letters Patent Acts were necessarily possessed of all the *naturalia* of these bodies politic, insomuch that it exceeded the prerogative to derogate from them in the incorporating charter. Hence it would seem that all associations erected by royal charter prior to 1825, with the exception of such as received their charter under the provisions of an Act of Parliament limiting their privileges, possess *ipso jure* all the *naturalia* of a cor-

Chartered companies are corporations.

poration proper. Provisions, it is said, were sometimes introduced into Scotch charters, bearing that the members of the company should, notwithstanding incorporation, be liable personally for the company debts, as in a common partnership; but there is great reason to believe that such provisions are either absolute nullities, or may tend to affect the validity of the charter.

Since 1825, the date of the first Letters Patent Act, the law is somewhat altered. If in charters granted since that period no provision is contained to the contrary, the company is a full corporation as of old, with all its rights and privileges; but if the charter contain clauses limiting the period of duration to a fixed term, and eliminating in whole or in part the element of non-liability of the members for the company debts (*a*), these limitations will be effectual.

Effects of charter.

The charter provides rules and regulations for the management of the association; and in so far as these extend, they form a code of laws binding on it and its members. Within the limits defined in the charter, the members may pass bye-laws for the management of the corporation; but in other respects they cannot in the least degree modify or innovate the constitution and rules laid down in the incorporating instrument (*b*). An Act of Parliament may alter or detract from the provisions of a charter, as it may entirely subvert the corporation; but the Crown has no power to vary the terms of a charter once accepted, or to force a new one on an unwilling corporation (*c*). Without a formal surrender, the Crown may in general alter or modify the terms of an old charter, provided this be consented to by the will of the corporation, which is that of a majority of its members (*d*); but if the charter have once been confirmed by statute, it cannot afterwards be varied without the authority of the Legislature (*e*).

Obtaining of charters.

To obtain a charter it is necessary to petition the Queen in Council, and to lodge the petition and a draft of the desired charter

(*a*) 1 Vict. c. 73, ss. 4, 29; and see 6 Geo. IV. c. 91; and Charter of National Bank of Scotland; Parl. Pa. Estimates and Accounts for 1831.

(*b*) *Hill* v. *Fairweather*, 1823, 2 S. 491; *Corstorphine* v. *Trades of Calton*, 1834, 12 S. 397. See *antea*, p. 37; and *Somes* v. *Currie*, 1 K. and J. 605.

(*c*) Grant 18 *et seq.*; *Dr Askew's* case, *per* Yates, J., 4 Burr. 2200.

(*d*) Grant 18 *et seq.*; Bull. N. P. 212 *c.*; *R.* v. *Haythorne*, 5 B. and C. 410; *R.* v. *Hughes*, 7 B. and C. 708.

(*e*) *Royal Ex.* v. *Vaughan*, 1 Burr. 155; Grant 10; *R.* v. *Miller*, 6 T. R. 268.

at the Council Office. These documents are afterwards laid before the Board of Trade, and any other Government officials whose advice may be deemed of importance. But before any report has been made thereon, it is necessary that notice of the application be inserted by the parties applying, three several times in the *London Gazette*, and in one or more of the newspapers circulating within the county in which it is proposed that the company's principal place of business shall be established, at intervals of not less than a week (*a*). If the report prove satisfactory, and it be resolved to accede to the prayer of the petition, the charter as finally adjusted is issued under the seal appointed to be used in Scotland in place of the Great Seal, and is duly registered. The Crown cannot incorporate persons against their will; and therefore, to render a charter valid and binding, it must not only be duly granted by the Crown, but accepted by those in whose favour it is issued.

Who are members.

The members of the corporation are such persons only as are declared to be so in the charter, or are subsequently admitted members in terms of the provisions contained in it, or authorized by it to be made for that purpose (*b*).

Validity of charters.

Charters, however formally obtained, are not necessarily of any legal value. If in granting them the Crown has exceeded its prerogative,—as by seeking to confer rights or privileges which could only be conceded by the Legislature; or if they have been obtained under a misconception—induced, for example, by false and fraudulent representations,—they may be reduced as nullities by the supreme tribunals (*c*). This may be done in England by the prerogative writ of *quo warranto*, or by an information in the nature of that writ filed by the Attorney-General, or by *scire facias*, at the instance or with the concurrence of the Crown (*d*). In Scotland, the proper form of procedure would seem to be by action of declarator and reduction, at the instance or with the concurrence of the Lord Advocate (*e*). Those at whose instance and petition

(*a*) Wordsworth on Mining and other Companies 235; Lindley 115; 1 Vict. c. 73, s. 32.

(*b*) See *per* Yates, J., 4 Burr. 2200; Lindley 114.

(*c*) *Mason* v. *Mag. of Montrose*, 1821, 1 S. 136; Act 1567, c. 18; *Macbride* v. *Lindsay*, 1852, 9 Ha. 574.

(*d*) See *Reg.* v. *East. Archi. Co.*, 4 De Gex, M. and G. 199, and 1 Ell. and Bl. 310, and 2 *ibid.* 856; Wharton's Law Lexicon 768; Grant on Corp. 39 *et seq.*

(*e*) See Act 1567, c. 18, which gave extraordinary powers to the Court of Session; *Bishop of Dunkeld* v. *Balme-*

the charter was obtained cannot insist for its reduction, however objectionable its provisions may be, or whatever irregularities may have attended its concession: from this they are barred by their own acts of application and acceptance (*a*). The same rule would seem to apply to those of the public who have contracted with the corporation on the basis of its validity, at least in so far as their engagements with it are concerned. But as regards acts done by a body pretending to be a corporation, when its charter was in fact invalid, these may seemingly be resisted and called in question by the public, without the necessity of formal proceedings to annul the charter (*b*). It must be confessed, however, that much obscurity hangs over this branch of corporation law in Scotland.

II. LETTERS PATENT COMPANIES.

Letters patent companies not corporations.

Companies formed under the provisions of the Letters Patent Acts are not corporations, but are mere common law companies or partnerships possessed of such privileges as are contained in their letters patent.

How obtained.

Letters patent are obtained in the same way, and by adopting the same procedure, as in the case of a royal charter; but the company is not formed by them: their effect is merely to superinduce certain privileges on the company when it has been formed as now to be explained (*c*).

Formation of company.

A company obtaining the privileges of letters patent must be entered into and be formed by a deed of partnership or association (sec. 5). This instrument contains the number of shares into which the undertaking is divided, the name or style of the company, and the names of the members, the date of commencement, the business or purpose, and the principal place of business. These five last particulars may be contained in a schedule attached to the contract. The contract must also contain the appointment of two or more officers to sue or be sued on behalf of the company (sec. 5) (*d*).

rino, 1630, M. 9892; and compare 15 and 16 Vict. c. 83, s. 43, with *Gillespie* v. *Young*, 1861, 23 D. 357.

(*a*) See *Mill* v. *Mag. of Montrose* as revd., 1825, 1 W. and S. 570.

(*b*) See Grant on Corp. 40; Lindley 115.

(*c*) 7 Gul. IV. and 1 Vict. c. 73, ss. 2 and 5.

(*d*) See *Philipson* v. *Earl of Egremont*, 6 Q. B. 587.

Within three months after the grant of the letters patent, the company must make a return to the General Registry Office at Edinburgh (in the case of a Scotch company), containing the date of the grant, the name of the company, the business and the principal place for carrying it on, the total number of shares regularly numbered in succession, the amount to which each share renders its holders liable, the names and (except in the case of corporations) the places of abode of all the members, and the distinctive number or numbers of shares held by each member. A return must at the same time be made of the name and description of the officers appointed to sue and be sued on its behalf. A form is given in Schedule A attached to the Act (secs. 6 and 16).

After this registration, no change can be made on the company name; and if the principal place of business is changed, a corresponding return, in the form of Schedule B (sec. 7), must be made within three months.

When persons cease to be members of the company, except by transfer of shares made by deed or in writing, or when any additional shareholder is added thereto, a return must in like manner be made; and when a member's name is changed by marriage or otherwise, a return must in like manner be made, setting forth the alteration in terms of Schedule C (sec. 8).

Authentication of returns.

All returns must be signed by one of the officers, and verified by a declaration of such officer, in terms of 5 and 6 Gul. IV. c. 62. In default of such officer, the return must be signed and verified by some member of the company (sec. 14). The form of declaration is given in the Appendix. The return is not rendered invalid by unintentional error, provided a correct return be transmitted within one month thereafter in the form of Sch. F, appended to the Act. The returns are registered by the Lord Clerk Register or his deputy, in books kept for the purpose; and any one is entitled to their inspection on a fee of one shilling, and to a certified copy on payment of a small sum (sec. 17). These certified copies are received as evidence (sec. 18).

Creation and termination of membership.

No person becoming a member by transfer or otherwise is entitled to recover any share of profits, until duly entered on the register (sec. 20); and persons ceasing to be members, whether by transfer, death, or otherwise, continue liable as members till the transfer or other fact by which membership ceased has been registered (sec. 21).

CHAPTER XIII.

FORMATION OF COMPANIES UNDER 'THE COMPANIES CLAUSES CONSOLIDATION (SCOTLAND) ACT, 1845' (*a*).

Special act.

A COMPANY formed under this statute is incorporated and brought under the general provisions of the statute by its special act, which at the same time provides for such peculiarities in its constitution and management as the Legislature deems necessary to enable it to prosecute successfully the ends and purposes of its creation. The clauses and provisions of the general statute are held to be incorporated with and to form part of the special act, except in so far as they are specially varied or rendered inapplicable by the latter. When the expression '*prescribed*' occurs in the general statute, it means something prescribed in the special act for the purpose referred to (preamble and secs. 1, 2, and 5).

In order to obtain a special act, the promoters must of course satisfy the Legislature of the public utility of their proposed undertaking. An instrument must be executed termed a parliamentary contract; and certain rules and formalities prescribed by the Standing Orders must be observed and carried out. These orders are published annually, and frequently vary in their details, so that the last edition only can be relied on.

Parliamentary contract.

The parliamentary contract is an agreement entered into by the subscribers, whereby each undertakes to pay a sum set opposite his name. The total amount subscribed must equal three-fourths of the expense which has been estimated as the cost of the proposed undertaking. The 'parliamentary contract' is not to be confused with the 'subscribers' agreement,' which, as already explained, is a private contract entered into between the promoters and those who agree to take shares in the company when formed. Both are, however, sometimes embodied in the same instrument.

(*a*) 8 Vict. c. 17.

Until the special act has been obtained, the company does not come into existence, and the partnership relation between the subscribers is not constituted. In the meantime they are not partners, but merely persons associated for the purpose of obtaining an act to create a corporation for the prosecution of a certain undertaking (*a*). When the act is obtained, the company is incorporated, and the subscribers and others applying for shares may become its members by registration. Companies incorporated by special act prior to the 8th of May 1845, are governed exclusively by their special acts; but all joint-stock companies in Scotland, incorporated, or to be incorporated, by Act of Parliament, for carrying on public undertakings since that date, are governed by their special acts, in combination with the provisions of the general Act which we are now considering (preamble) (*b*).

Distribution of capital.

The capital of a company formed under this general Act is divided into shares of the number and amount prescribed in its special act, and they must be numbered in arithmetical progression (sec. 6).

Shareholders.

As to who are to be deemed shareholders, or, in other words, what constitutes membership, the following are the statutory provisions: 'The word shareholder shall mean shareholder, proprietor, or member of the company' (sec. 3). 'Every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered in the register of shareholders, shall be deemed a shareholder of the company' (sec. 8).

Register of shareholders.

This register of shareholders is a book which the company is required to keep, and in which must be entered from time to time the names of the shareholders, together with the number of shares they are entitled to hold. The names must be in alphabetical order, and the shares must be distinguished by their numbers. The book must be authenticated by the company seal, adhibited at the first ordinary meeting, or at the next, and so forth from time to time (sec. 9). When so authenticated, it is declared to

(*a*) See chap. x. p. 76.

(*b*) When a part of a Scotch line of railway runs into England, the company is brought under the provisions of the corresponding English general Act 8 and 9 Vict. c. 16, *quoad* such part of the line. See *Wilson* v. *Cal. Ra.*, 5 Ex. 822.

be *prima facie* evidence of membership against a person whose name stands registered therein (sec. 29). And creditors have a right to its inspection (sec. 38). The company must also keep a 'shareholders' address book,' which may be perused by any shareholder at convenient times (sec. 10).

Shareholders' address book.

Certificate of proprietorship.

Any shareholder is entitled on demand, and on payment of a small fee, to a certificate of proprietorship from the company, having the common seal affixed (sec. 11); and provisions are made for having it renewed when worn out or damaged (sec. 13). This certificate is declared to be *prima facie* evidence of the title of the shareholder, and of his executors, administrators, successors, and assigns, to the share therein specified; but the want of this document does not prevent a sale of shares by the holder (sec. 12).

Evidence of membership

These statutory provisions appear to have for their object, 1. The supplying of evidence of membership against persons sued as shareholders; and 2. The furnishing of evidence of proprietorship in favour of parties claiming the rights of members.

against shareholders.

(1.) Evidence of membership as against persons sued as shareholders.

Register *prima facie* evidence.

The register is *prima facie* evidence of membership against any person whose name it bears. But to entitle it to this statutory privilege, it must have been kept and authenticated in accordance with the statutory provisions contained in sec. 9. Hence it was rejected as *prima facie* evidence in favour of the company, where it did not contain the correct number of shares belonging to each person, and the amount of subscriptions paid upon such shares (*a*). A rough share-book is not entitled to the statutory privilege (*b*). And the register, however accurately kept, is not *prima facie* evidence that one whose name it bears was a shareholder at any time prior to the date when the seal was affixed (*c*). But it will be received as *prima facie* evidence if duly sealed, though it may not have been kept with perfect regularity, and may in some respects be inaccurate and imperfect (*d*). If the register is in several

(*a*) *Cal. and Dumb. Ra. Co.* v. *Lockhart*, 1855, 17 D. 917.

(*b*) *Birkenhead, Lancashire, Ra. Co.*, 4 Ex. 426; *Cheltenham and Grt. West. Mid. Rail. Co.*, 9 C. and P. 55.

(*c*) *Ibid.*

(*d*) *Whitehaven Ra. Co.* v. *Bain*, 1850, 12 D. 829, aff. 3 House of Lords Cases; 7 Bell's Ap. 79; *London Gr. Jun. Ra. Co.*, 1 Q. B. 271, 2 M. and

volumes, the last of which contains a recapitulation, it is sufficiently authenticated by the seal being affixed to such recapitulation (*a*). And if the seal be *de facto* affixed, it is not necessary to prove the time or place at which, or the authority by which, it was appended (*b*).

Register not conclusive evidence.

The register, though *prima facie*, is not conclusive evidence of membership against a party whose name appears thereon. It is provided by sec. 8, that a person shall be deemed a shareholder, if by subscription or otherwise he has become entitled to a share in the undertaking, and has been entered in the register. Hence a party whose name has been registered, may rebut the *prima facie* evidence so created, by showing that his name was inserted on the register, while he had not acquired the right to be a shareholder (*c*). But if a person has dealt with the company as a shareholder, and has been registered as such, he cannot set aside the effect of such registration, on the ground that certain conditions or formalities strictly requisite to confer on him the right to become a shareholder had not been observed. Such objections are personal to the company, and will in any view be held as waived by the conduct of the party (*d*).

Register not the only evidence.

The register is not the only evidence by which a party may be proved a member at the instance of the company. The statute, though declaring the register to be *prima facie* evidence, nowhere excludes other evidence. Hence, when the register, from its irregular character and want of proper authentication, may not be *prima facie* evidence, it is still admissible as evidence *pro tanto* to be supplemented by evidence *prout de jure* (*e*). But it should seem that a party cannot be made liable as a shareholder to the company, when his name has not been registered at all (*f*).

G. 606; *Birmingham Ra. Co.*, 1 Q. B. 256; *Southampton Dock Co.*, 1 Man. and Gr. 448; *Gr. Nor. Ra. Co.* v. *Inglis*, 13 D. 1315, aff. 1852, 1 Macq. 112.

(*a*) *Grt. Nor. Ra. Co.* v. *Inglis*, 1851, 13 D. 1315; aff. 1852, 1 Macq. 112.

(*b*) *North-West. Ra. Co.*, 5 Ex. 855; and see *Cal. and Dumb. Ra. Co.* v. *Lockhart*, 1855, 17 D. 917.

(*c*) *Waterford Ra. Co.*, 8 Ex. 279; *Carmarthen Ra. Co.*, 1 Fos. and Fin. 282. See *per* Lord President in *Cal. Ra. Co.* v. *Lockhart*, 1854, 17 D. 30.

(*d*) *Sheffield and Man. Ra. Co.*, 7 M. and W. 574; *Thomson* v. *Fullarton*, 1842, 5 D. 379.

(*e*) *Cal. and Dumb. Ra. Co.*, 1854, 17 D. 25 and 917.

(*f*) See as to this under the head '*Calls.*'

Evidence of membership in favour of shareholders.

(2.) Evidence of membership in favour of parties claiming the rights of shareholders.

Certificate.

The certificate of proprietorship is *prima facie* evidence of the title of the person whose name it bears; but as the want of such certificate is not conclusive against one claiming to be a shareholder, if he can establish that character *aliunde*, so the mere possession of the certificate is not conclusive evidence in his favour, but may be rebutted by proof *prout de jure*.

Register.

The entry of a party's name on the register, as it affords *prima facie* evidence against him if sued for calls, would also seem to be good evidence in his favour when claiming dividends or other rights of a shareholder. But since it is not declared that those only are to be deemed shareholders whose names appear on the register, it should seem that persons whose names are not on the register may vindicate their rights of membership by evidence *prout de jure* (*a*).

Compulsitors to register.

A person entitled to shares may compel the company to register him as a shareholder. This is done in England by *mandamus* (*b*); in Scotland the remedy would seem to be by action of declarator, with conclusions *ad factum præstandum*. Refusal or unreasonable delay to register a party entitled to shares, will ground an action of damages against the company (*c*).

(*a*) See *Great Nor. Ra. Co.* v. *Inglis*, 1851, 13 D. 1315; aff. 1 Macq. 112.

(*b*) *R.* v. *General Cemetery Co.*, 6 E. and B. 415; *Copeland* v. *North-East. Ra. Co.*, 6 E. and B. 277.

(*c*) *Catchpole* v. *Ambergate Ra. Co.*, 1 El. and Black. 111; *Stewart* v. *Anglo-Cal. Gold Min. Co.*, 18 Q. B. 736.

BOOK II.

CONSTITUTION AND MANAGEMENT OF PARTNERSHIPS AND COMPANIES.

CHAPTER I.

GENERAL RULES.

THE purposes for which a partnership or company is formed, the manner in which it is to be managed, and the machinery to be employed in the management, are generally laid down with tolerable clearness in the instrument of formation, whether this be partnership articles, deed of settlement, etc., or Act of Parliament, charter, or memorandum and articles of association. These must be rigidly adhered to while they remain in force; and every attempt to depart from them may be effectually resisted by any partner or shareholder who deems himself aggrieved (*a*).

Private firms.

Unless it be otherwise provided in the contract, the powers of the members of an ordinary partnership are in all respects equal; and therefore any attempt on the part of some of the partners to exclude others from the management will be at once checked on application to the Court (*b*). Indeed, so jealously are the rights of

(*a*) See, as illustrative of this, *Maxton* v. *Brown*, 1839, 1 D. 367; *Fleming* v. *Campbell*, 1845, 7 D. 935; *Williamson* v. *North Brit. Ra. Co.*, 1846, 9 D. 255; *Brown* v. *Adam*, 1848, 10 D. 744; *Balfour's Trust* v. *Edin. and Northern Ra. Co.*, 1848, 10 D. 1240; *Wedderburn* v. *Scot. Cent. Ra. Co.*, 1848, 10 D. 1317; *National Ex. Co.* v. *Glasgow and Ard. Ra. Co.*, 1849, 11 D. 571; *Hill* v. *Edin. and Glasgow Ra. Co.*, 1849, 21 Jur. 445; *Graham* v. *North Brit. Bank*, 1849, 11 D. 1165; *Wilson* v. *Glasgow and S.-W. Ra. Co.*, 1850, 13 D. 227; *Pollock* v. *Ritchie*, 1851, 13 D. 640; *Blackburn* v. *Stewart*, 1851, 13 D. 1243; *Western Bank* v. *Bairds*, 1862, 24 D. 859.

(*b*) *Dickson* v. *Dickson*, 1323, 2 S. 413; *Rowe* v. *Wood*, 2 Jac. and W.

partners guarded in this respect, that when, by the provisions of the contract of copartnery, shareholders were prohibited from access to the books, the Court held that this did not prevent a shareholder from insisting on their exhibition when he accused the directors of fraud (*a*).

Arrangements by which the management is exclusively entrusted to a few of the partners, receive effect only *inter socios*, and do not affect the public while they remain ignorant of such restrictions (*b*).

COMPANIES.

Directors,

In companies, as contradistinguished from private firms, the ordinary and executive management is entrusted exclusively to managers or directors, who are chosen by the body of shareholders or partners, while the latter retain only the right of general supervision, and the direction of such extraordinary acts of administration as require the approval of majorities. The shareholders or partners are therefore in no sense the agents of the company, nor is it bound by their acts or representations. Even when the company is not incorporated, the public are presumed to be aware of this feature in the management (*c*).

When the company is unincorporate, the constitution and powers of the managing body are determined by the articles of association; when incorporate, they are regulated by the provisions of the incorporating instrument, whether special act, charter, or registered memorandum and articles of association.

appointment of;

The regulations of the company generally prescribe the manner in which the directors or other managers are to be appointed, and also the qualifications necessary for the office. Any substantial infringement of these rules will invalidate the election, and entitle dissentient shareholders to have officials so appointed interdicted from acting, provided the irregular appointment has not been homologated by express or implied acquiescence (*d*). But the acts of

558; *Goodman* v. *Whitcomb*, 1 Jac. and W. 589.

(*a*) *Collins* v. *North British Bank*, 1850, 13 D. 349.

(*b*) See Powers of Partners.

(*c*) *Burnes* v. *Pennel*, 1849, *per* Lord Campbell, 6 Bell's App. 562, and 2 H. of Lords Cas. 520.

(*d*) *Blackburn* v. *Finlay*, 1848, 10 D. 590; *Blackburn* v. *Buchanan*, 1848, 20 Jur. 199.

such irregularly appointed office-bearers will bind the company in all contracts into which strangers have *bona fide* entered with them as the company's accredited agents (*a*).

number of.

The number of those composing the managing body is also generally fixed by the company's partnership articles, or by its incorporating instrument. And when this is so, the number cannot, as a general rule, be varied. When, however, the company is unincorporate, it would seem that an alteration may be made by a resolution of the shareholders, passed at a meeting specially convened. Yet it would appear the resolution must be unanimous (*b*). But where the number has been fixed by special act or royal charter, it will, it is thought, remain unalterable (*c*), unless the provision has been merely directory or permissive (*d*). Acts done by a less number of directors than that specially required by the company's regulations, will in general be held invalid (*e*), unless adoption or acquiescence can be established (*f*). All duly appointed directors are such, whether they choose to act or not. But whether they cease to be so in consequence of bankruptcy or other supervening disqualification, depends on the rules of the company (*g*).

Control by meetings.

The body of shareholders exercise their right of controlling and regulating the management of the company, by resolutions at meetings duly convened. The company contract, whatever it may be, usually contains provisions for the calling of such meetings; but if those who are entrusted with this function refuse to do so, the Court will on application interfere where this is necessary for the interests of the shareholders (*h*).

Resolutions.

To the validity of these resolutions it is in general necessary that due notice shall have been given to every one entitled to

(*a*) *Edin. and Leith Ra. Com.* v. *Hebblewhite*, 6 M. and W. 707; *Swansea Dock Co.* v. *Levien*, 20 L. Jour. Ex. 447; *Miles* v. *Bough*, 3 Q. B. 845; *Hill* v. *Edin. and Glasgow Ra. Co.*, 1849, 21 Jur. 455.

(*b*) *Smith* v. *Goldsworthy*, 4 Q. B. 430; *Davis* v. *Hawkins*, 3 M. and S. 488. See *Maxton*, 1839, 1 D. 367.

(*c*) Lindley 466.

(*d*) *Thames Haven Dock Co.* v. *Rose*, 4 Man. and Gr. 552.

(*e*) *Bosanquet* v. *Shortridge*, 4 Ex. 699; *Ridley* v. *Plymouth Grinding Co.*, 2 Ex. 711; *Brown* v. *Andrew*, 13 E. Jur. 938, Q. B.

(*f*) *Thames Haven Dock Co.* v. *Rose*, 4 Man. and Gr. 552.

(*g*) *Phelps* v. *Lyle*, 10 A. and E. 113; *Wilson* v. *Wilson*, 1839, 6 Scott 540.

(*h*) *Foss* v. *Harbottle*, 2 Ha. 461.

attend (*a*); and what amounts to due notice will be determined by the provisions to that effect contained in the company's regulations. Nothing can, without notice, be transacted at an adjourned meeting, except what was left unfinished at the previous one (*b*); but those present at the original meeting do not require to receive notice of the adjournment (*c*); and shareholders *de facto* attending a meeting cannot afterwards object to its proceedings, on the ground that the notice they received was informal or insufficient (*d*).

Meetings, ordinary and extraordinary.

Meetings are either ordinary or extraordinary. Ordinary meetings are for the transaction of general business, and are held at stated times; extraordinary meetings are held *pro re nata*, and the matter to be considered should be specified in the notice. Resolutions passed at extraordinary meetings, in relation to matters for which they were not convened, are mere nullities; and they cannot be validated by subsequent ordinary meetings, unless the latter might have dealt with the subject-matter of the resolution in the first instance (*e*). The same meeting may be both ordinary and extraordinary (*f*); but if an ordinary meeting is held and adjourned, it still continues to be an ordinary meeting, though notice is given that special business will be transacted at it (*g*).

Majorities rule.

The resolution of the majority of those present at a meeting duly called, is in general the resolution of the company; except where it affects matters which, by the company's constitution, it is beyond the province of majorities to deal with, *e.g.* a change in the purposes for which the company was formed (*h*). Vote by proxy is not allowed, unless the company's contract contain a special provision to that effect (*i*). Voluntary absentees are bound by the resolutions of a meeting duly convened and acting within the sphere of its competency (*k*).

Minutes of meeting.

Minutes of meeting are generally required, by the special act,

(*a*) *R.* v. *Langhorn*, 4 A. and E. 538.

(*b*) *R.* v. *Grimshaw*, 10 Q. B. 747.

(*c*) *Wills* v. *Murray*, 4 Ex. 843, 862.

(*d*) *British Sugar Co.*, 3 K. and I. 408.

(*e*) *Lawes's* case, 1 De G. M'N. and G. 421.

(*f*) *Graham* v. *Van Diemen's Land Co.*, 1 H. and N. 541; *Cutbill* v. *Kingdom*, 1 Ex. 494.

(*g*) *Wills* v. *Murray*, 4 Ex. 843.

(*h*) See Chapter on Powers of Majorities; and *Phœnix Life Association*, 2 J. and H. 441; *Ernest* v. *Nicholls*, 6 H. of L. Ca. 401.

(*i*) Grant on Corporations 256, n. *q*; Lindley, p. 471.

(*k*) *Norwich Yarn Co.*, 22 Beav. 165.

to be entered in a book and signed by the chairman. It is a common, though by no means a safe practice, for the secretary to enter the minutes after the meeting is over, to be authenticated by the chairman at the next meeting (*a*).

Partnership books are usually evidence against every partner; for all have access to them, and do or may take part in their formation. But the books kept by the office-bearers of companies are no evidence against ordinary members, who are excluded from any share in their preparation (*b*). This is sometimes declared to be otherwise by the special act. Minutes of meetings and the books of the company are not evidence for the company as against third parties, unless expressly declared to be so by statute (*c*). Partnership books.

(*a*) *Miles* v. *Bough*, 3 Q. B. 845; Lindley, p. 472; *Cornwall Consolidated Mining Co.*, 5 H. and N. 423. See *Great Nor. Ra. Co.* v. *Inglis*, 1851, 13 D. 1315; aff. 1 Macq. 112.

(*b*) *Per* Lord Justice Turner in *Longworth's* case, 1 De G. F. and I. 32; and also *per* Lord Campbell, p. 27.

(*c*) *Hill* v. *Manchester Water Works*, 5 B. and Ad. 866; *Maguire's* case, 3 De G. and S. 31; *Alderson* v. *Clay*, 1 Stark. 405.

CHAPTER II.

CONSTITUTION AND MANAGEMENT OF COMPANIES REGISTERED UNDER THE ACT 1862.

WHEN a company, which had no previous existence, is formed under the Act 1862, its constitution is to be found in its registered memorandum and articles of association, coupled with the general rules and provisions contained in the Act. The memorandum of association fixes the character and purposes of the company, and these remain unalterable. The regulations applicable to the management are contained partly in the memorandum, but chiefly in the articles of association, and may be altered as occasion requires by special resolution.

Effect of registration.

When a company already formed by Act of Parliament is, by registration, brought under the operation of the Act 1862, the constitution it received from the Legislature remains intact, except in so far as changes may be made by the company, in accordance with powers to that effect contained in the special act. Companies already formed by royal charter, or privileged by letters patent, retain in like manner the constitution given them by the Crown, except in so far as it may be altered with the sanction of the Board of Trade. Private companies, again, already existing, retain after registration the constitutions originally defined in their deeds of settlement, contracts of copartnery, or other instruments of formation, except in so far as they may be changed, in pursuance of provisions to that effect in their instruments (sec. 196). It must be observed, however, that all provisions contained in the letters patent, deed of settlement, contract of copartnery, or other such instrument of formation, remain for ever unalterable, when they would have been contained in the memorandum of association, and could not have

been changed if the company had been formed originally by registration under the Act 1862. When alterations are competent, they are made by special resolution (sec. 196).

When registration has taken place, all the provisions of the special act, letters patent, deed of settlement, contract of copartnery, or other instrument of formation, are deemed to be conditions and regulations of the company, in the same manner as if they had been contained in a registered memorandum and articles of association; and all the provisions of the Act 1862 apply in the same way as if the company had been formed originally by registration (sec. 196).

All companies registered under the Act are said to be incorporated, but it is only such as are formed with limited liability that can be deemed proper corporations. Companies registered with unlimited liability are, strictly speaking, *quasi* corporations (*a*).

Statutory articles of association.

Except certain provisions of the most wholesome, and indeed necessary description, the Act may be said to have prescribed nothing as to the constitution and management of projected companies, but to have left these matters to be fixed by the good sense of the promoters. It has however, in Table A, Schedule 1, furnished the public with a body of regulations admirably conceived and adapted to all the exigencies of management. These may be adopted in whole or in part as the articles of association; and it need scarcely be said, that, except in very peculiar cases, promoters will evince their discretion by adopting them in their entirety, or at least in departing from them to as small an extent as possible.

We shall now proceed to consider the general rules which the Act lays down for the management of all companies coming under its operation. Some of these provisions are intended to apply only in the absence of special regulations for the same purposes in the company's instrument of formation; but others are in all cases peremptory, and cannot be set aside either expressly or by implication.

Registered office.

Every company under the Act must have a registered office to which communications and notices may be addressed, under a penalty not exceeding £5 for every day during which this regulation has not been complied with. Notice of the situation of this

(*a*) *Antea*, pp. 41-2.

office, and any change therein, must also be given to the registrar, and recorded by him (secs. 39, 40).

Name.

Every company limited either by shares or guarantee must have its name affixed outside every office in which it carries on business, under a penalty not exceeding £5 for every instance of omission, exigible not only against the company, but against its directors or managers who have knowingly or wilfully authorized or permitted such default. The name must also be engraven on the company's seal, and must appear in all notices, advertisements, etc., issued by the company, and in all mercantile documents signed on its behalf: the director or other official infringing these rules subjects himself in a penalty of £50, besides being liable personally to any one who suffers loss in consequence of a company obligation not being binding from the want of these formalities (*a*) (secs. 41, 42).

Register of mortgages.

Limited companies must keep registers of all mortgages and charges specifically affecting company property. In these must be entered a brief description of the property mortgaged or charged, the amount of the charge, and the names of the mortgagees. Officials through whose fault this regulation has been infringed, incur a penalty not exceeding £50. The register is patent to creditors and members at all reasonable times, and any refusal of access subjects the offender in heavy progressive penalties (sec. 43).

Certain companies must publish statement in schedule.

Every limited banking company, and every insurance company, and deposit, provident, or benefit society under the Act, must, before commencing business, and also on the first Mondays of February and August in each year, make a statement of the amount of its capital, how much has been subscribed for, and how much has been called up and received,—what are its liabilities, and what its assets. The Act provides a form which must be adhered to as closely as possible. A copy of this statement must be conspicuously displayed in the company's registered and other offices, and wherever it carries on business. The provisions of this section are guarded by heavy progressive penalties, both against the company and the officials personally (sec. 44). Creditors and members are entitled to a copy of this statement for a sum not exceeding sixpence.

List of directors.

Every company not having a capital divided into shares must keep at its registered office a register of the names, addresses, and

(*a*) See *Penrose* v. *Martyn*, El. Bl. and El. 499.

occupations of its directors and managers, and send a copy of it to the Registrar of Joint-stock Companies, notifying from time to time such changes as may occur. Heavy progressive penalties are incurred both by the company and its directors infringing this provision (secs. 45, 46).

Bills and promissory-notes are deemed to have been made, accepted, or indorsed on behalf of the company, when they have been signed in the company's name, or on its behalf, by any person acting under the authority of the company (*a*) (sec. 47). The liability of limited banking companies issuing notes is unlimited in relation to such notes (sec. 182). Bills and notes.

No company under this Act can carry on business for more than six months after the number of members has fallen under seven, without subjecting every member to liability for the whole company debts contracted after that period; and any one of them may be sued for the same without joinder of the others (sec. 48). Loss of members.

One general meeting at least must be held every year (sec. 49). In the absence of special regulations, the following provisions are made for general meetings. They may be summoned by five members. They will be held duly summoned if seven days' notice in writing has been served on every member in the same General meeting.

(*a*) This section is somewhat different from the corresponding provision of the Act 1856 (sec. 43), which runs as follows: 'A promissory-note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of any company registered under this Act, if made, accepted, or indorsed in the name of the company by any person acting under the express or implied authority of the company.' But the following cases which arose under the Act of 1856 may be referred to as illustrative of the provisions of the present Act. A promissory-note was signed by three persons describing themselves as 'directors' of a company with limited liability, and was countersigned by a party who described himself as secretary of the company: 'London, Dec. 13, 1856. Three months after date we jointly promise to pay A. or order £600 for value received in stock on account of the London and Birmingham Hardware Co., Limited.' It was held by a majority that the directors signing it were not personally liable in the note. —*Lindus* v. *Melrose*, 3 H. and N. 177, 27 L. J. Exch. 326. See also 2 H. and N. 293. In *Penrose* v. *Martyn*, 5 E. Jur. N. S. 362, 28 L. J. Q. B. 28, the secretary of a limited company, and who had authority to accept bills for the company, accepted a bill drawn on the company, in which he was described as 'secretary to the said company.' On an action being brought, it was held that the secretary was liable, under sec. 31 of the Act 1856, in consequence of the word '*limited*' having been omitted in the name of the company. In *Eastwood* v. *Bain*, 3 H. and N. 738, 28 Law Jour., Ex. 74, a share-

way as notices are required to be served by Table A, Schedule 1; every member has one vote; and any person elected by the members present may preside (sec. 52).

Special resolution.

Very particular provisions are made as to what is necessary to constitute a special resolution; and the reason of this appears when it is seen that by special resolution the greatest changes may be made on the company regulations, even to the extent of modifying its constitution. To the validity of a special resolution, it is necessary that it be passed at a general meeting, of which notice specifying the intention to propose the resolution has been duly given. It must have a majority of not less than three-fourths of the members present; and it must be confirmed by a majority at a subsequent general meeting, of which due notice has been given, held not less than fourteen days and not more than one month from the date of the first meeting. It must be observed, however, that by due notice is merely meant notice in terms of the company's regulations; that unless a poll is demanded by at least five members, the chairman's declaration that the resolution has been carried is conclusive, without any proof of the number or proportion of votes; and that when a poll is demanded (*a*), reference

holder drew a bill on the company, which was *limited*. It was accepted by 'A. B., secretary, by order of the Royal Surrey Gardens Company (Limited),' the acceptance having been granted by order of certain directors of the company. On the company becoming insolvent, action was brought by a second indorsee of the bill (but who did not show onerosity either as regarded himself or the first indorsee) against the directors who had authorized acceptance, alleging in one count acceptance, and in another charging them with falsely representing that they had power to accept on behalf of the company. It was held that the directors were not liable as acceptors; and that even if there had been a false representation, the plaintiff was not entitled to a verdict, in respect that he had not proved that he had sustained damage thereby. In *Smith* v. *Johnson*, 3 H. and N. 222, the drawers of a bill of exchange indorsed it to a registered company, and the officer of the company delivered it to the plaintiff for value, bearing the indorsation of two directors, '*per procuration*.' The acceptor having been sued by the plaintiff, it was held, that whether the indorsation was sufficient to ground an action by the plaintiff against the company or not, there was such an indorsation as entitled the plaintiff to a verdict against the acceptor on a traverse of the allegation of the indorsation by the company to the plaintiff.

As to the necessity of the bill being within the sphere of the company's business in order to render it binding on the company, see *Balfour* v. *Ernest*, 5 C. B. N. S. 601.

(*a*) When a poll is demanded, the exclusion of any person entitled to

must be had to the number of votes to which each member is entitled by the company's regulations (sec. 51).

By a special resolution which has been duly passed and confirmed in this manner, the regulations contained in the articles of association, or in Table A, Schedule 1 (when this is applicable to the company), may be altered in whole or in part, by addition, subtraction, or substitution; subject, however, to the provisions of the Act, and to the conditions contained in the memorandum of association (sec. 50). Even these last may be modified by special resolution, to the effect of changing the company's name (secs. 12 and 13), increasing the capital, issuing new shares, consolidating and dividing the capital into shares of larger amount, and converting the paid-up shares into stock (sec. 12).

Registering of special resolutions.

A copy of every special resolution must be printed and forwarded to the registrar of joint-stock companies, and recorded by him. Failure to do this for fifteen days after confirmation of the special resolution, involves the company and such of its officers as are guilty of such omission in heavy penalties (sec. 53). When articles of association have been registered, a copy of every special resolution in force for the time being must be annexed to or embodied in every copy of the articles subsequently issued. Where no articles of association have been registered, a printed copy of every special resolution must be forwarded to any member requiring it, on payment of one shilling. Failure to comply with these provisions involves the company and its officials in appropriate penalties (sec. 54).

Powers of attorney.

By instrument under its common seal, the company may confer powers of attorney on any person to bind it by deed in places out of the United Kingdom; and deeds executed by him on its behalf, under his own seal, will be equally valid, as if they were under the company seal (sec. 55).

Examination into state of company affairs.

The Board of Trade may appoint inspectors to examine into and report on the affairs of the company on the following applications: 1. In the case of a banking company with a capital divided into shares, on the application of members holding not less than

vote seems a good ground for reducing an election. *Reg.* v. *Rector of Lambeth*, 3 Nev. and P. 416; *Campbell* v. *Maund*, 5 Ad. and Ell. 865. See *White* v. *Steele*, 8 E. Jur. N. S. 1177.

one-third of the whole shares issued; 2. In the case of other companies with a capital divided into shares, on the application of members holding one-fifth of the whole shares issued; and 3. In the case of a company not having a capital divided into shares, on the application of at least one-fifth of the whole membership (sec. 56). The application must, however, be supported by such evidence as the Board may require, that it is made without malicious motives and on reasonable grounds; and the applicants may be required to find security for costs (sec. 57).

It is also competent for the company itself to appoint inspectors to examine into its affairs. This is done by special resolution (sec. 60).

Production of documents.

When an examination has been ordered, the company officers must produce to the inspectors all books and documents in their power; and they must answer all questions relative to the business; for which purpose they may be put on oath by any inspector. Their refusal to comply with these provisions involves them in heavy penalties (sec. 58).

Reports of examination.

The inspectors make their report, either written or printed as may be directed, to the Board of Trade or to the company, as the case may be; and a copy must also be sent to those members requesting the examination, if they so desire. Unless the Board of Trade direct the costs to be paid out of the company assets, they must be paid by those who demanded the inquiry (secs. 59, 60). The report of the inspectors, when authenticated by the company seal, is evidence of their opinion in any legal proceedings (sec. 61).

CHAPTER III.

CONSTITUTION AND MANAGEMENT OF COMPANIES FORMED BY ROYAL CHARTER OR LETTERS PATENT.

Chartered companies.

COMPANIES incorporated by royal charter are proper corporations; and whatever may be the language of their charters, they necessarily possess all the rights, privileges, and *naturalia* of corporations, if erected prior to the first Letters Patent Act. This is also the case with companies chartered subsequently to that period, provided the Crown has not in the charter detracted in any respect from these privileges in express terms. In all other matters the constitution of such companies, and the rules and regulations for their management, will be found in their charters, or in these taken in connection with deeds of partnership or association, referred to in such charters, or framed in conformity with provisions to that effect which they may contain. Matters of minor detail affecting the management are generally regulated by resolutions of the company, framed from time to time in virtue of the powers or provisions contained in the charter, or plainly deducible from its terms.

Letters patent companies.

Companies privileged by letters patent have their constitution and mode of management regulated by that instrument, read in connection with their deeds of partnership or association, by which, as we have already seen, the companies are formed.

In the case of companies whose privileges are derived from letters patent granted to them in virtue of the existing Letters Patent Act (1 Vict. c. 73), their constitution and rules of management are contained in their deeds of copartnery or association, taken in connection with their letters patent; but the fact of their accepting these brings them under the operation of the Act, which contains certain provisions that are imperative and must be observed

in all cases. In this respect the present Letters Patent Act stands in much the same relation to the letters patent and instrument of formation of a company brought under its operation, that the Companies Clauses Act of 1845 does to the special acts of companies formed under its provisions.

Returns.

The distinguishing feature of the Letters Patent Act is the adoption of a system of registration by '*returns*,' which must be made from time to time by the company to the Enrolment Office of the Court of Chancery in England, if the principal place of business is in England; to the Enrolment Office of the Court of Chancery in Ireland, if the principal place of business is in that country; and to the General Registry Office at Edinburgh, if the principal place of business is in Scotland (sec. 16). These returns must be registered for a small fee by the proper officers, who in Scotland are the Lord Clerk Register or his deputy, in books kept for the purpose, with an alphabetical index of the names of the companies. Any person is at liberty, on payment of a shilling, to inspect these books and index, and may require a certified copy of any return on payment of one shilling and sixpence per folio. The day of registration of every return must be written thereon by the proper officers (sec. 17). Certified copies of these returns are declared to be evidence in all proceedings of what nature soever they may be (sec. 18).

Objects of returns.

These returns embrace almost every particular in the constitution and management of a company brought under the operation of the Act. The first return, which must be made within three calendar months after the grant of the letters patent, must contain the date of the grant of the letters patent, the company name, its business, and principal office; the total number of shares, the amount of liability attaching to each, and the number of shares held by each member. It must also contain the name of the officer appointed to sue and be sued on behalf of the company (sec. 6). Any change in the company's principal place of business must be made the subject of a return within three months after such change takes place (sec. 7). When persons cease to be members, or when new members are assumed (unless these alterations take place by transfer of shares in writing), or when old members change their names by marriage or otherwise, a corresponding return must be made (sec. 8).

When shares are transferred by deed or in writing, a written notice must be given to the company at its principal office, specifying the distinguishing numbers of the shares transferred, and the name and residence of the transferrer and those of the transferree. This notice must be signed by both parties (sec. 9), and a return in terms thereof must then be made by the company within three months (sec. 10).

When the liability of members has been limited to a certain amount per share, any member who has made a payment for the company in consequence of a decree against it, may make a return thereof accompanied by the proper vouchers (sec. 11). And if the company afterwards repay the money so advanced or paid, they must make a corresponding return without delay (sec. 12).

On the death, resignation, or removal of any officer appointed to sue and be sued on behalf of the company, another must be forthwith appointed in his place; and a return containing the names and designations of both must be made within three months (sec. 13).

Authentication of returns.

All returns must be signed and verified by one of the company officers appointed to sue and be sued—the verification to be in terms of the Act 5 and 6 Gul. IV. c. 62. In default of such officer, the return may be signed and verified by some member of the company (sec. 14). Returns relating to members and transfers of shares are not rendered invalid by unintentional error, provided a correct return be made within one calendar month (sec. 15).

Effect of not making returns.

No person becoming a member of the company can sue for or recover any share of profits, until a return of the transfer or other fact whereby he became a member has been duly registered (sec. 20). And, in like manner, any one ceasing to be a member remains liable as such until the transfer or other fact by which he ceases to be a member has been placed on the register (sec. 21).

Rules as to returns.

Regulations as to forms of returns, and mode of keeping the register, and other matters incidental thereto, may be made from time to time by the Lord Chancellor in England, by the Lord Chancellor and Master of the Rolls jointly in Ireland, and by the Lord Clerk Register and Lords of Council and Session jointly in Scotland (sec. 19).

Effect of the Act on internal management.

It will be observed, that, with the exception of requiring the appointment of two officers in whose names the company may sue and be sued, and of the system of returns above detailed, the Letters

Patent Act does not in the least degree interfere with the internal arrangements of the company. These are left entirely to the provisions of the deed of copartnery, or to that in conjunction with the letters patent conferring the desired privileges. It would rather seem, however, though that is not expressly stated, that after obtaining the letters patent no alterations of importance can be made on the provisions of the original deed of association, since these must be taken as forming the conditions in respect of which the letters patent were conferred. It is remarkable that the Act contains no provisions for keeping of books by the company, nor for any system of internal registration. The system adopted is that of external registration, by means of returns made to and registered by Government officials.

Bye-laws.

The Act contains no provisions as to the making of bye-laws. But the company would seem to have the power of making these as required from time to time, provided they do not interfere with the provisions of its deed of association or letters patent, and provided they do not contravene the regulations of the Act. Without this power, the internal management of the association would often be greatly impeded.

Common seal transfers.

The possession of a common seal is apparently taken for granted in the Act (sec. 27). Yet contracts to bind the company are not required to be under seal. There is no form specified for transfers of shares; transfer by deed or in writing is mentioned, but other modes are nowhere excluded (secs. 8 and 9).

CHAPTER IV.

CONSTITUTION AND MANAGEMENT OF COMPANIES FORMED UNDER THE COMPANY CLAUSES ACT, 1845.

ALL companies formed under the provisions of this Act are proper corporations in the fullest sense of the term. In other respects their constitutions are to be found in the provisions of the Act itself, except in so far as these may be varied or excepted by their special acts of incorporation, or may be amplified by the 'Lands Clauses Act,' or by the 'Railway Clauses Act,' as the case may be. We shall afterwards have occasion to advert to the provisions of these last two consolidation Acts; but will in this place proceed to examine the provisions of the Company Clauses Act, in so far as they relate to management.

Ordinary meetings.

The first general meeting of shareholders must be held at the time appointed in the special act, and in the absence of such appointment, within one month after the passing of the Act. If no time is prescribed for future general meetings, they must be held in February and August half-yearly, or at such other times as a general meeting may appoint. These general meetings are the ordinary meetings of the company. Both they and the extraordinary meetings must be held in the prescribed place; and if none is prescribed, then in such place as may be appointed by the directors (sec. 69).

No business other than that appointed by the general or special acts can be transacted at ordinary meetings, unless special notice have been given by advertisement (sec. 70).

Extraordinary meetings.

Every general meeting other than the ordinary half-yearly meetings is extraordinary, and it lies with the directors to call extraordinary meetings. Nothing can be done at these meetings

beyond what is set forth in the notice convening them (secs. 71 and 72).

The directors may be required to call extraordinary meetings by a certain number of shareholders possessing a certain aggregate number of shares, as provided by the special act; and in the absence of such provision, by twenty or more shareholders holding in the aggregate not less than one-tenth of the company capital. The requisition must be in writing under their hands, and must fully express the object of the meeting; it may be left at the company office, or given to three directors, or left at their residences. If the directors fail for twenty-one days to call the meeting, the prescribed number of shareholders may call it themselves on fourteen days' notice (sec. 73).

Notice. Ten days' notice at least of every meeting must be given by advertisement, specifying the place, day, and hour of meeting; and every notice of an extraordinary meeting, or of an ordinary one, at which unusual business is to be done, must specify the business (*a*) (sec. 74).

Quorum. At any meeting, whether ordinary or extraordinary, the prescribed quorum must be present either personally or by proxy. And if no quorum be prescribed, then the quorum will be by shareholders holding in the aggregate not less than one-twentieth of the capital, and being in number at least one for every £500 of such proportion, unless this would give a greater number than twenty, in which case twenty shareholders holding one-twentieth of the capital will be sufficient. If no quorum be present for half an hour after the time of meeting, nothing can be done beyond declaring a dividend, if that be one of the purposes of the meeting; and the meeting is held adjourned *sine die*, unless it has been called for election of directors (sec. 75).

Chairman. The following persons preside as chairman, one in default of the others respectively: 1. The chairman of the directors; 2. Their deputy-chairman; 3. One of the directors chosen by the meeting; 4. Any shareholder so chosen (sec. 76).

Business. Nothing can be done at the meeting except the business for which it was convened. It may be adjourned from time to time, and from place to place; but nothing can be done at an adjourned

(*a*) See *Swansea Dock Co.* v. *Levien*, 20 L. J. Ex. 447.

meeting but what was left unfinished at the original meeting (sec. 77).

Shareholders vote according to the scale prescribed in the special act; and in the absence of such a provision, each shareholder has a vote for every share he holds up to ten, and an additional vote for every five shares beyond this up to one hundred, and another vote for every ten shares above one hundred. No shareholder can vote unless all his calls have been paid (sec. 78). Votes by proxy are competent. The proxy must be in writing, in the same or similar terms with those given in Schedule F, signed by the shareholder if an individual, and under the common seal if a corporation. The voting is by majorities, the chairman having a casting vote (sec. 79). The instrument appointing a proxy must be transmitted to the secretary within the prescribed period; or if no time prescribed, not less than forty-eight hours before the hour of meeting (sec. 80). When several persons are joint holders of shares, he whose name stands first on the register is deemed sole proprietor for purposes of voting (sec. 81). Shareholders incapacitated by lunacy or minority vote by their legal guardians, either in person or by proxy (sec. 82). Unless a poll be demanded, a declaration by the chairman that the resolution has been carried, is, when entered on the company books, sufficient evidence of the fact (sec. 83).

Mode of voting.

Proxy.

Guardians.

Poll.

APPOINTMENT OF DIRECTORS.

The number of directors must be that prescribed in the special act (sec. 84); but when power is given to increase or reduce the number prescribed, this power can only be exercised in general meeting after due notice. The order of rotation in which such increased or reduced number go out of office, and what shall form a quorum, may also be fixed in this manner (sec. 85).

Number.

The directors appointed by the special act continue in office, unless it is otherwise provided, until the first ordinary meeting held in the following year. The shareholders may then elect a new body of directors, or may continue all or some of the original directors in office, supplying the places of those not re-elected by the election of others (sec. 86). If, at a meeting for the election

Election.

of directors, no election takes place by reason of no quorum being present within one hour of the appointed time of meeting, the meeting stands adjourned till the following day at the same time and place; and if then, for the same reason, no election can be made, the existing directors continue in office until new directors are appointed at the first ordinary meeting in the following year (sec. 87).

Qualification.

No one can be a director who is not a shareholder possessed of the prescribed number of shares (*a*), or who holds an office or place of trust under the company, or is interested in any contract with the company (*b*); and no director can, during the term of his office, accept any other office or place of trust or profit under the company, or become interested in any contract with the company (sec. 88). If any such disqualification supervene after election of a director, his office as director becomes vacant *ipso facto* (sec. 89) (*c*). A shareholder is not, however, disqualified from being a director of the company because he happens to be a member of another incorporated joint-stock company, between which and the company of which he is or is sought to be made director, a contract exists (sec. 90).

Order of retiring.

The directors retire from office at the time and in the proportions following—the individuals to retire being determined by ballot among their fellows, unless they agree otherwise. At the end of the first year after the first election, and at the end of the second and third following years, the number prescribed by the special act go out of office; but if the special act is silent on this matter, one-third of those in office after the first election go out the first year, one-half of the remaining number the second year, and the remainder the third year. At the first ordinary meeting in any subsequent year, the prescribed number, if any, and otherwise one-third of the directors, being those longest in office, retire. If, how-

(*a*) See *Hill* v. *Edin. and Glasgow Rail. Co.*, 1849, 21 Jur. 455. This requirement cannot be satisfied by nominally paid up shares. *Llanharry Hæmatite Co.*, 1864, 10 E. Jur. N. S. 812.

(*b*) Such contracts, to amount to a disqualification, must be made with the company in the prosecution of its undertaking. A company's banker may be one of its directors. See *Sheffield and Man. Ra. Co.* v. *Woodcock*, 7 M. and W. 574.

(*c*) *Blaikies* v. *Aberdeen Ra. Co.*, 1851, 14 D. 66, House of Lords, June 1852.

ever, the fixed number of directors be some number not divisible by three, and the number to retire be not prescribed, the directors determine what number, as nearly one-third as may be, are to retire, so that the whole shall go out of office in three years. The places of the retiring directors are supplied by the election of an equal number of qualified shareholders; and every retiring director may be re-elected, and is in that case considered to be a new director (sec. 91).

When a vacancy occurs by death, resignation, or disqualification, and not by rotation as already described, another duly qualified person may be elected to fill up the vacancy; and the person so substituted remains in office as long as the person whose place he takes would have been entitled to continue (sec. 92). Vacancies.

POWERS OF DIRECTORS.

The directors have the management of the company, and exercise all its powers, except such as are directed to be exercised by a general meeting of the company. They must, however, exercise their powers in terms of the provisions of the general and special acts, and subject to the control of general meetings convened for that purpose. Yet the acts of directors done prior to any resolution passed by such general meetings are not rendered invalid thereby (sec. 93).

Unless otherwise provided by the special act, the following powers of the company can only be exercised at general meetings, and are not competent to directors: 1. The choice and removal of directors; 2. The increasing and reducing of their number; 3. The choice of auditors; 4. The determination as to remuneration of directors, auditors, treasurer, and secretary; 5. The determination of the amount of money to be borrowed on mortgage; 6. The determination as to augmentation of capital; 7. The declaration of dividends (sec. 94). General powers.

PROCEEDINGS OF DIRECTORS.

The directors hold meetings when and where they choose to appoint; and they may adjourn as they see fit. Any two of the directors may require the secretary to call a meeting. Their meet- Meetings.

ings must consist of the prescribed quorum; and when none is prescribed, of at least one-third of their number. All questions are determined by majorities, and the chairman has a casting vote (sec. 95). At the first meeting of directors held after their original and annual appointments, the directors present choose one of their number as chairman for the following year, and they may also choose a deputy-chairman. If these die, or resign, or become disqualified to act, others are chosen at the next meeting of directors; and the substitute remains in office as long as he in whose place he came would have been entitled to continue (sec. 96). When the chairman and deputy-chairman are both absent from any meeting, the directors present choose some one of their number to act for the occasion (sec. 97).

Committees. The directors may appoint committees of their number, with power to do any acts within the sphere of their own authority (sec. 98). Such committees may meet and adjourn as they see fit. Their quorum, if not prescribed, is fixed by the general body of directors; one of the members present is appointed chairman, and all questions are determined by majorities—the chairman having a casting vote (sec. 99).

Contracts. The directors or their committees may make contracts so as to bind the company as follows: 1. In contracts which require to be by deed, or by agreement in writing, and signed by the parties thereto, the directors or their committees may contract on behalf of and bind the company in writing, either under the company's common seal, or signed by the directors or their committee, or any two of either; and such contract may in the same manner be varied or discharged. 2. In contracts valid by parole, the directors or their committees may contract on behalf of and bind the company by parole only, and may in like manner vary or discharge the same (sec. 100).

The directors are bound to cause all proceedings of the company, of themselves, or of their committees, to be entered in books provided for the purpose, and kept under their superintendence. Every entry must be signed by the chairman of the meeting, and is then to be received as *ex facie* evidence in courts of justice (sec. 101). Informalities in the appointment of directors or of their committees do not invalidate their proceedings (sec. 102).

Directors, when acting in the lawful execution of their office, do not incur personal liability; but are entitled to indemnity out of the company funds for all payments made by them, and for all losses, costs, and damages incurred by them in the execution of the powers wherewith they have been entrusted. Calls on the capital remaining unpaid may be made for this purpose (sec. 103). Indemnity.

AUDITORS.

Unless otherwise directed, two auditors are elected at the first ordinary meeting after obtaining the special act. One of them goes out of office each ensuing year, and another is appointed to supply his place; but the retiring auditor does not go out until another has been elected (sec. 104). The auditors can hold no other office in the company, nor be in any way interested in its concerns, except as shareholders; but unless otherwise prescribed, every auditor must hold at least one share in the undertaking (sec. 105). Auditors.

The auditors vacate office by rotation, determined in the first instance by ballot or agreement, and afterwards by seniority. Those retiring are immediately re-eligible (sec. 106). Vacancies occurring among the auditors in the course of the year may be filled up by election at any general meeting (sec. 107); and the same provisions apply to the election of auditors as to that of directors (sec. 108). Vacancies.

The directors must deliver to the auditors the balance-sheet and other periodical accounts fourteen days before the ordinary meeting at which they are produced to the shareholders; and it is the duty of the auditors to examine them, and either make a special report, or simply confirm them. This report is read together with that of the directors at the ordinary meeting. The auditors may employ accountants to aid them in their labours, at the expense of the company (secs. 110, 111). Duties.

The directors must take security from every officer entrusted with the monies of the company; and they may demand from such officers an account in writing of all monies received, and how they were expended. These officials must produce the vouchers and receipts, and pay over to the directors or their mandataries the Duty of officers to account.

remaining balance (secs. 112, 113). Summary proceedings may be taken before the sheriff or two justices against parties failing to account. Officers refusing to produce vouchers, books, and other documents, may be imprisoned until they comply; and officers believed to be about to abscond, may be summarily apprehended and detained in custody until they are tried, or give security for their appearance (secs. 115, 116). Proceedings taken against the company officers do not liberate their sureties (sec. 117).

ACCOUNTS.

The directors are required to keep full and accurate accounts of all monies received or disbursed on behalf of the company. The company books must be balanced fourteen days before each ordinary meeting (unless otherwise prescribed); exact balance-sheets must be made up, containing the property and the debts, the profit and the loss; and these balance-sheets must be examined by at least three of the directors, and signed by the then chairman or his deputy. The books and balance-sheet must be open for the inspection of shareholders for fourteen days before and for one month after each ordinary meeting at the principal office, unless otherwise provided; and the balance-sheet, and auditors' report thereon, must be produced at the meeting to the assembled shareholders. A book-keeper appointed by the directors enters the company accounts in books, which he is bound to submit to the inspection of any shareholder demanding it for fourteen days before and one month after every ordinary meeting, under a penalty not exceeding £5 (secs. 118, 119, 120, 121, 122).

Books.

BYE-LAWS.

The company has power to make bye-laws for the purpose of regulating their officers and servants, and generally for the proper management of the company affairs, provided these bye-laws do not conflict with the common law of that part of the kingdom where they are to have effect, and with the provisions of the general and special acts. Penalties may be imposed by these bye-laws on the officers and servants of the company, and they are all entitled to a

copy of them. Such bye-laws are sufficiently proved by production of a written or printed copy under the seal of the company (secs. 127, 128, 129, 130).

Every shareholder has a right to inspect the following documents: 1. The shareholders' address book (sec. 10); 2. The register of mortgages and bonds (sec. 48); 3. The register of consolidated stock (sec. 66); 4. The company account books (sec. 120). Shareholders are entitled, moreover, to have copies of the shareholders' address book (sec. 10) and the account books, or of any part of these documents (sec. 122).

The company is bound at all times, after six months from the date of its formation, to keep in the principal business office a copy of the special act printed by the Queen's printers. When the undertaking is a railway, canal, or the like, the works of which are not confined to one place, copies of the special act must in like manner be deposited in the offices of the clerks of the peace of the several counties into which the works extend, and in the office of the town or burgh clerk of any town or burgh within one mile of which the works extend. All persons interested may inspect these copies, and make extracts or copies from them (sec. 165). The special act of any company may at all times be purchased of the Queen's printers.

CHAPTER V.

CAPITAL OF COMPANIES, AND ITS DIVISION INTO SHARES.

THE capital of a company is a matter of fundamental importance. If it is too small, the undertaking will not be carried on with much chance of success; if too large, the shareholders will receive a very inadequate return on their shares. The amount should therefore be determined after a very mature and deliberate consideration of all the circumstances and contingencies of the case. It is usually fixed at formation, and forms one of the fundamental conditions of the contract (*a*). Hence, persons agreeing to take shares in a company with a certain capital, cannot be required to become shareholders if the amount of capital be increased or diminished (*b*). The contract of copartnery may however be so framed, that the amount of capital originally agreed upon is not an essential condition (*c*); and persons may agree to take shares in a company when the amount of capital has not been defined. In such cases subscribers cannot escape from the agreement by pleading that the company as formed has a different capital from that originally contemplated (*d*). Subscribers may also be estopped from maintaining this plea, by conduct, acquiescence, or adoption (*e*).

General rules.

In common law companies, the agreed-upon capital specified in the articles of copartnery or other instrument of formation cannot be altered without the consent of all the members. This arises

(*a*) *Monro* v. *Edinburgh Cemetery Co.*, 1851, 13 D. 595. See *North British Bank* v. *Collins*, 1852, 25 Jur. 119, aff. 15 D. (H. L.) 29, 1 Macq. 369; *Electric Telegraph Co.*, 22 Beav. 471.

(*b*) See *Turner* v. *Mollison*, 1833, 11 S. 669; *Caledonian Dairy Co.*, 1834, 12 S. 394.

(*c*) Previous cases.

(*d*) *Nixon* v. *Brownlow*, 2 H. and N. 455; *Norman*, 5 De G. M. and G. 648.

(*e*) *Sturrock* v. *Thoms*, 1851, 13 D. 762.

from the consideration that the amount of capital in such associations forms the very basis and condition of the contract of copartnery. Not only may the profits be greatly affected by a change in the amount of capital, but the risk of loss where liability is unlimited may be indefinitely increased (*a*). A power to increase capital may however be conferred in the instrument of formation, and its exercise will be effectual, provided the prescribed formalities are duly observed (*b*). In the case of incorporated companies, where the capital has been fixed by charter, letters patent, or special act, its amount cannot be varied even with the consent of all the members, unless the incorporating instrument contains some provision to that effect (*c*).

Registered companies.

As to companies registered under the Act 1862, it is provided by sec. 12, that a company limited by shares may increase its capital by the issue of new shares, if authorized to do so by its regulations as originally framed, or as altered by special resolution in terms of secs. 50 and 51. Notice of such alteration must be given to the registrar (sec. 34). The capital of companies divided by shares cannot be diminished (sec. 12). It does not appear whether any such restriction applies to companies unlimited, or limited by guarantee. In these cases the liability of members will not be materially affected by an alteration of the capital. Table A, Schedule 1, contains articles (26, 27, and 28) applicable to the increase of capital, which, if adopted in the articles of association, will give the following regulations:—On a *special resolution* of the company, the directors may increase the capital by the issue of new shares. The aggregate increase, and the number of new shares, are fixed by the general meeting, and in the absence of a special direction by the directors. If no direction is given to the contrary, the new shares must be offered to the members in proportion to the shares already held by them. Shares not so accepted may be disposed of by the directors as they think most beneficial for the company. The capital so raised is considered part of the original capital, and is subject to the same provisions as to calls, forfeiture, etc.

(*a*) *Monro* v. *Edinburgh Cemetery Co.*, 1851, 13 D. 595. See also *North British Bank* v. *Collins*, 1852, 25 Jur. 119, aff. 15 D. (H. L.) 29, 1 Macq. 369; *Electric Telegraph Co.*, 22 Beav. 471; *Fisher* v. *Tayler*, 2 Ha. 218.

(*b*) *Ibid.*

(*c*) Lindley 522.

Chartered and letters patent companies.

In chartered companies, whose capital has been fixed in their charters, no increase or diminution of the capital appears competent, unless perhaps power to this effect has been conferred in the instrument of formation. And the same may be said of companies privileged by letters patent, where the capital has been specified in the contract or deed of association; for in such a case the agreed-upon amount of capital must be held as forming a condition in view of which the letters patent were conferred.

Companies formed under the Act 1845.

The Consolidation Act, 1845, contains no direct provisions for the increase or diminution of the capital fixed under the special act; and therefore, unless the special act confer a power to this effect, no alteration can be made on the capital, even with the concurrence of all the members. Where, however, the company is authorized by its special act to borrow money, it is empowered by sec. 59 to raise the sums authorized to be borrowed by the creation of new shares, which are to be considered the same as the original capital as to calls, forfeiture, etc. (sec. 60), and which, if the old shares are at a *premium*, are to be offered to the then shareholders in proportion to the shares held by them respectively (sec. 61). The new shares vest in the parties accepting; and if not accepted, are to be disposed of by the company as seems best for the interests of the company (sec. 62). If, at the time of this increase of capital, the existing shares are not at a *premium*, the new shares may be issued in such manner and on such terms as the company think fit (sec. 63).

Borrowing as distinguished from increasing capital.

But though the capital of a common law company cannot be increased without the consent of all the members, and that of an incorporated company cannot always be enlarged even with this unanimous consent, a distinction must be made between increasing capital and the mere borrowing of money to pay off debts already existing. The latter power may in general be exercised by majorities (*a*), and in some cases by the board of directors.

Division of capital.

The capital of companies, whether incorporate or at common law, is usually divided into shares. When the number and amount of shares have once been fixed, the general rule seems to be that

(*a*) *Bryon* v. *Metro. Saloon Co.*, 4 E. Jur. N. S. 680; *Auxiliary Clipper Co.*, 4 K. and J. 733 (8 Vict. c. 17, ss. 40 and 41).

they, like the capital, cannot afterwards be altered (*a*). It is an indictable offence to issue as good more shares than the prescribed number. This is, in fact, a fraud on the other shareholders (*b*).

I. SHARES IN PARTNERSHIPS.

The word '*share*' has not been employed with much precision of meaning, and is often liable to ambiguity. Hence it is difficult, if not impossible, to give it a definition which shall be at once exhaustive and practically useful. Speaking generally, however, it may be said that by a share in an ordinary partnership is meant the interest of one of the partners in the concern, by reference to which his right to participate in profits while the partnership subsists, and to receive a proportion of the free assets when it is dissolved, is determined, and in respect of which, in a question *inter socios*, his amount of contribution for company losses is *in dubio* to be ascertained.

Amount depends on agreement.

This share or interest depends entirely on agreement, subject to the equitable rule of the civilians, that unless each partner have some participation in the profits, or the hope of it, there can be no valid partnership (*c*).

Modes of ascertaining.

When the contract is reduced to writing, it generally contains, or ought to contain, a clause defining each partner's share. When this is so, any ambiguity of construction will be resolved by the Court.

Variance in practice.

But it too often happens that the contract is not reduced to writing, or contains no provision on this subject. When, in these circumstances, disputes arise as to the amount of each partner's share, it seems to have been the former practice of the Court of Session to determine the matter without the intervention of a jury. In doing so, the Court proceeded on the principle, that once the fact of partnership was established, the presumption of law was for equality, but gave effect to any evidence or circumstances from which another arrangement might fairly be inferred (*d*).

(*a*) *Smith* v. *Goldsworthy*, 4 Q. B. 430; but see *Ambergate Ra. Co.*, 4 Ex. 540.

(*b*) *R.* v. *Mott*, 2 Car. and P. 521.

(*c*) Ersk. iii. 3, 19; Dig. lib. xvii. t. 2, l. 29, s. 2.

(*d*) *Struthers* v. *Barr*, 1821, 1 S. 122; *M'Whirter* v. *Guthrie*, 1822, 2 W. and S. 153, 1 S. 295, Hume 760; *Blair* v. *Russell*, 1828, 6 S. 836, and 8 S. 72.

In the case of *Campbell's Trs.* v. *Thomson* (*a*), the House of Lords remitted with instructions to have the question tried by jury; but the Court appear still to have adhered to their former practice (*b*), unless the late case of the *Aberdeen Bank* has fixed the rule in favour of jury trial (*c*). This was always the custom in England (*d*).

Presumptions.

As to the principles upon which the amount of a partner's share is to be determined, the law both in England and Scotland appears to stand thus: If the contract be in writing, and contain a clause defining the amount, this will be conclusive. In the absence of writing, there is a presumption in favour of equality; but this is merely a presumption, and may be rebutted by evidence to the contrary (*e*). As a consequence of this, when the question of the existence of partnership is sent to a jury, there being no deed of copartnery, the proportional interest of each partner ought to be put in issue (*f*).

In consequence of the reversal of the judgment in *Campbell's Trustees* v. *Thomson*, it has sometimes been supposed that the law of England differed from that of Scotland in reference to the presumption of equality (*g*); but a careful consideration of the cases will lead to the conclusion that, when rightly understood, both systems are and always have been at one on this branch of the subject.

Joint adventures.

The same rules are applied to joint adventures or partnerships in single transactions (*h*), and also to shares in companies when it is doubtful to how many of them each partner is entitled (*i*).

Presumption from proportion of profits.

As a general rule, it may be stated that the amount of interest or share which a partner is ascertained to have in the profits of the concern, will also regulate the proportion of the capital and

(*a*) 1829, 7 S. 650; reversed, 5 W. and S. 16, 7 Bligh 432.

(*b*) *Fergusson* v. *Graham*, 1836, 14 S. 871; *Buchanan* v. *Lennox*, 1838, 16 S. 824.

(*c*) 1859, 22 D. 44.

(*d*) Lindley 573; *Peacock* v. *Peacock*, 16 Ves. 49; *Binford* v. *Dommett*, 4 Ves. 756.

(*e*) *Robinson*, 20 Beav. 98; *Peacock*, *supra*; *Webster* v. *Bray*, 7 Ha. 159; *Stewart* v. *Forbes*, 1 Mac. and G. 137; compared with *Aberdeen Bank* and other cases quoted *supra*.

(*f*) *Aberdeen Bank*, 1859, 22 D. 44.

(*g*) Collyer 106.

(*h*) *Ferguson* v. *Graham*, 1836, 14 D. 871; *Buchanan* v. *Lennox*, 1838, 16 S. 824; *Robinson* v. *Anderson*, 20 Beav. 98; *M'Gregor* v. *Bainbrigge*, 7 Ha. 164; *Hanslip* v. *Kitton*, 8 E. Jur. N. S. 835.

(*i*) See *Somes* v. *Currie*, 1 K. and J. 605.

stock to which he is entitled on dissolution. This, however, is a mere presumption, which may be set aside by evidence to the contrary (*a*).

Shares in Companies.

Difference between interest and shares.

In the case of companies with a capital divided into shares, the word shares means a definite portion of its agreed-upon capital, and not the interest which a partner may have in the concern; for he may possess one or many such shares, and his interest consists of the number of shares which he *de facto* holds. Shares in companies of this description are always equal, for they are the units into which the agreed-upon capital was divided at the formation of the company. The only exception to this is, when an addition to the original capital has been raised by the issue of a certain number of new shares. Here the new shares will all be equal to each other, but they may be of greater or less value than the old shares.

When capital not divided into shares.

When a company has not a capital divided into shares, the word share has the same meaning that it has in common partnerships, viz. each partner's interest in the concern. An example of this occurs in such registered companies as are formed under the Act 1862, with a liability limited by guarantee and not by shares.

Preferential shares.

Preferential or guaranteed shares differ from other shares in this respect, that their owners are entitled to share profits to a certain extent in preference to other members of the company. This privilege does not, however, in the smallest degree affect the liability of such preference shareholders to the public. In that respect they are in *pari casu* with the others. They are creditors of the company for payment of the guaranteed amount of their dividends only after payment of all the company's public creditors has been made.

Shares personal property.

Shares, whether in partnerships or companies, are in their nature personal property, because they are nothing more than a *jus exigendi;* and it makes no difference in this respect, that the company property may to a large extent consist of heritage (*b*). Bank stock,

(*a*) *Nelson* v. *Bealby*, 8 E. Jur. N. S. 397.

(*b*) *Corse* v. *Corse*, 1802, 13 F. C. 162, M. App. Her. and Mov. 2; *Sime* v. *Balfour*, 1804, 13 F. C. 339, M. App. Her. and Mov. 3, aff. 1811, 5 Pat. App. 525; *Murray* v. *Murray*, 1805, 13 F. C. 441, M. App. Her. and

whether the bank be a corporation or not, is moveable (*a*). In the Company Clauses Consolidation (Scotland) Act (*b*), and in the Act of 1862, shares are expressly declared to be personal property (*c*).

Act of 1862.

When a company, formed under the Act 1862, is limited by shares, the capital divided into shares of a fixed amount must be specified in the memorandum of association (sec. 8). In the case of companies limited by guarantee or unlimited, and having a capital divided into shares, the capital so divided must be specified in the articles of association (sec. 14). The number and amount of shares must in like manner be stated in the memorandum or articles, according to the character of the company (secs. 8 and 14). The shares must be numbered in arithmetical progression (sec. 22). The company must keep at its registered office a register of members, containing the names and addresses of members, the shares held by each, and the amount paid thereon (sec. 25). A certificate under the company's seal, specifying any shares or stock held by a member, is *prima facie* evidence of title to such shares or stock (sec. 31). The shares or other interest of members are expressly declared to be personal estate (sec. 22). As soon as the company is registered the shares emerge, and the subscribers become converted into the shareholders. In the case of companies previously existing, and afterwards registered under the Act, it is not necessary to number the shares, if they were not so distinguished before (sec. 196).

Royal charter.

In chartered companies the incorporating instrument generally provides rules and regulations as to the numbers, amount, and registration, and also as to the mode in which their ownership is to be established. When they do not possess a capital divided into shares, the charter provides in like manner regulations for ascertaining the interests of the members.

Letters patent.

In companies privileged by the Letters Patent Acts, the deed of association specifies the number of shares into which the capital is divided, the shares being numbered in succession (secs. 5, 6, and 7).

Act 1845. Shares as distinguished from scrip.

Shares properly so called, in opposition to scrip, emerge in companies formed under the Act 1845, when the original subscribers, or those otherwise entitled to shares, are duly registered after the

Mov. 4; *Minto* v. *Kilpatrick*, 1833, 11 S. 632.

(*a*) *Dalrymple* v. *Halkett* (1735), M. 5478; *Royal Bank* v. *Fairholme*, 1770, M. App. Adjud. No. 3.

(*b*) Sec. 7. (*c*) Sec. 22.

special act has been obtained. Persons become entitled to shares, 1. By signing the parliamentary contract or subscribers' agreement; 2. By taking scrip issued by the company; 3. By purchasing scrip-certificates; and 4. By transfer from a registered shareholder. Until registration, however, the proper character of shareholder in the statutory sense does not exist; and liability for calls, and the right to vote or share dividends, do not emerge (*a*) (sec. 8).

Shares, etc., regulated by the special act.

The special act prescribes the number of shares into which the capital is to be divided, and the amount of each share. The shares must be numbered in arithmetical progression, and every share must be distinguished by its appropriate number (sec. 6). The shares are personal estate, and transmissible as such (sec. 7). The shares, shareholders, and the amount paid on each share, must be entered in the 'Register of Shareholders,' which must be kept in terms of the provisions of sec. 9. The company must deliver certificates of shares, in terms of sec. 11, to every shareholder on demand. This certificate is *prima facie* evidence of title to shares, but the want of it does not preclude a shareholder from disposing of his shares (sec. 12). If the certificate be worn out or damaged, on its being produced at a meeting of directors, a new one may be obtained, and so also if the old one be proved to the satisfaction of the directors to have been lost. In either case an entry of the substituted document must be duly made in the register of shareholders (sec. 13).

Consolidated Stock.

It is a common practice to convert paid-up shares into consolidated stock, which is then divided among the shareholders according to the amount of their former shares. This practice has many advantages, and in common law companies it may be done by a vote of a majority. In incorporated companies it can only be done in accordance with the provisions of the instrument of formation.

Act 1862.

In companies formed under the Act 1862, the capital may be consolidated and divided into shares of a larger amount, and paid-up shares may be converted into stock. But such changes can only

(*a*) See as to this, '*Preliminaries to Formation*,' p. 69.

be made in virtue of authority to that effect in the company regulations as originally framed, or as altered by special resolution passed in terms of secs. 50 and 51. If the provisions of Table I. are adopted as the articles of association, the regulations applicable to the subject will be found in R. 23, 24, and 25, which are very similar to the corresponding provisions of the Consolidation Act of 1845, to be afterwards noticed. By sec. 28, it is provided that the company must give notice of consolidation or conversion of capital into stock to the Registrar of Joint-stock Companies, specifying the shares so consolidated, divided, or converted. And by sec. 29 it is provided, that when such conversion has taken place with due notice to the registrar, all the provisions as to shares shall cease as regards such consolidated stock; and thenceforth the register of members, and the list of members to be forwarded to the registrar, shall show the amount of stock instead of the amount of shares, etc., as formerly.

Notice.

Chartered companies must be regulated as to this matter by the provisions, if any, contained in their charters. The Letters Patent Acts make no provisions on the subject, and do not seem to contemplate the conversion of shares into stock.

Chartered and letters patent companies.

By the Companies Clauses Act, 1845, it is provided (sec. 64) that the company, with consent of three-fifths of the votes of the shareholders at general meeting, on due notice, may convert the shares paid up into a '*general capital stock*,' to be divided among the shareholders according to their respective interests therein. When this takes place, the regulations and provisions as to shares cease, and the several holders of the stock may thenceforth transfer it in the same manner as shares, and the company are required to enter any such transfer of stock in a book (sec. 65). The company must also from time to time enter in a book, called the '*Register of Holders of Consolidated Stock*,' the names of the holders of stock; and this book must be accessible at all reasonable times to the several share or stock holders (sec. 66). The stockholders are entitled to dividends and all other privileges that would arise to them on shares of equal amount (sec. 67).

Act 1845.

II. TRANSFER OF SHARES.

Delectus personæ.

From the *delectus personæ*, which is one of the characteristics of ordinary partnership, it follows that no new partner can be admitted into the society without the consent of all the partners. This is a settled principle in the Roman, English, and Scottish systems of law, and probably in every other where the principles of this contract have been elaborated (*a*). Hence, except of consent, no new partner can be admitted by alienation, either legal or voluntary; and on the death of a partner, his representatives cannot claim to be admitted as partners with the survivors.

Conventional provisions.

According to the Roman law, it was not even competent to stipulate in the partnership contract that the interest of a person deceasing should descend to his heir (*b*); but it is now settled in the English and Scottish systems, that the parties may validly agree that their heirs and their assignees shall be adopted in their room (*c*); and when this arrangement has been made, a partner may introduce whom he will into the concern, either by testamentary deed or by transference of his share during his own lifetime. It is not necessary that this agreement shall have been made in the copartnery contract; it may be made at any time: nor is it invalid because informal, but appears to be proveable by facts and circumstances (*d*).

Unauthorized transfers.

Even where no consent to a transfer of shares has been given, a partner may assign his share to a third party without consulting his copartners; and the same may happen by legal diligence. But in this case the assignee acquires no right to become a partner; he merely becomes entitled to payment of what may be due to his credit in the share (*e*). In like manner, a partner may, without the consent of his copartners, bequeath his share to whom he will. In this case the devisee acquires no right to enter the firm, but merely to what may at the testator's death be due him by the

(*a*) Dig. lib. xvii. t. 2, l. 59; Lindley 593; Bell's Com. ii. 620.

(*b*) Dig. lib. xvii. t. 2, l. 59, and l. 65, s. 9.

(*c*) Stair i. 16, 5; *Warner* v. *Cuningham* (1798), M. 14603, aff. 3 Dow. 76; Bell's Com. ii. 620; *Lovegrove* v. *Nelson*, 3 M. and K. 20; *Bentley* v. *Bates*, 4 Y. and C. 182.

(*d*) *Bargate* v. *Shortridge*, 5 House of Lords Cases 297.

(*e*) *Glyn* v. *Hood*, 8 W. R. 37; *Smith* v. *Parkes*, 16 Beav. 115.

firm (*a*). If the testator during life receives his share, the legacy falls (*b*); but it has been held in England not to be adeemed by any arrangement among the partners varying the amount of the share (*c*), converting it into stock, or amalgamating the company with another (*d*).

Public companies.

In public companies, where there is no *delectus personæ*, shares are presumed transferable at the will of the owners, unless the contrary appear from the instrument of formation (*e*). Sometimes it is made a condition of transference that the consent of the other shareholders or of the directors shall be obtained. In the latter case, the directors must consider themselves as trustees for the company, and must act fairly with a view to its interests alone (*f*).

Modes of transfer.

The mode of transfer is regulated by the constitution of the company, and by the statute or special act by which it may be incorporated. It is not unusual to find the power of transfer clogged with certain conditions, such as consent on the part of the directors, payment of calls already made, offer of pre-emption to the company, etc.; and certain formalities are often prescribed as essential to complete the transaction, *e.g.* that it shall be by deed under seal (as in many English companies), that it shall be in writing, that it shall be duly entered in the company books, etc. As a general rule, these conditions and formalities must have been fulfilled before the transferrer is divested, and the transferree invested, with the rights and liabilities of a shareholder (*g*). This rule must, however, be understood in a reasonable sense, and is liable to some exceptions.

Formalities must be observed.

Limitations.

In the first place, non-compliance with the prescribed formalities and conditions of transfer can only be pleaded by the party for

(*a*) *Ponton* v. *Dunn*, 1 Rus. and Myl. 402.

(*b*) *Presb. of Kirkcudbright* v. *Blair*, 1742, Elch. Legacy 10; *Pagan* v. *Pagan*, 1838, 16 S. 383. See *Chalmers*, 1851, 14 D. 57.

(*c*) *Ellis* v. *Walker*, Amb. 309; *Backwell* v. *Child*, Amb. 260; *Phillips* v. *Turner*, 17 Beav. 194.

(*d*) *Oakes* v. *Oakes*, 9 Ha. 666; *Phillips* v. *Turner*, 17 Beav. 194.

(*e*) 2 Bell's Com. 620.

(*f*) *Taft* v. *Harrison*, 10 Ha. 489; *R.* v. *Liverpool and Manchester R. Co.*, 21 L. J. Q. B. 284; *Poole* v. *Middleton*, 29 Beav. 646.

(*g*) *Ross* v. *East Lothian Ra. Co.*, 1848, 10 D. 1284; *East Lothian Ra. Co.* v. *Peffers*, 1849, 11 D. 1184.

whose safety or advantage they were prescribed. Hence, in a question between the transferrer and the transferree, it is no objection to the validity of the transfer that no offer has been made to the company, in terms of a condition to that effect in the company contract (*a*). And it was held *jus tertii* for an arrester in competition with a prior onerous assignee of the shares of a railway company, to found on forms provided in favour of the company as to completion of sales of their stock (*b*).

Estoppel by waiver, etc.

Secondly, a party may be estopped from pleading want of compliance with prescribed formalities or conditions, if waiver on his part can be clearly made out. Thus, when the company contract provided that a partner could not assign a share unless certain stipulations were complied with, and a partner did assign without observing these stipulations, the company were held barred from objecting to the transaction in respect of homologation (*c*). So where a purchaser of shares had not complied with the provisions of the company's contract, but had nevertheless paid some calls on his shares, and was registered as a shareholder, he was found not entitled to resist payment of further calls on the ground that he was not a shareholder (*d*). So also when, in terms of an Act of Parliament, company shares required to be transferred by deed, a party who did not take a transfer in this form, but signed a paper describing himself as a shareholder, and procured himself registered as such, was found liable for calls as a shareholder (*e*). Again, where by the constitution of a company certain solemnities were required to a valid transfer, and a shareholder had executed a transfer of certain shares, which was registered in the company books, it was held that the company could not repudiate the transference, on the ground that the registration had not been made

(*a*) *Macandrew* v. *Robertson*, 1828, 6 S. 950.

(*b*) *Thomson* v. *Fullerton*, 1842, 5 D. 379; *Robertson* v. *Thom*, 1848, 11 D. 353; *Weatherly* v. *Turnbull*, 1824, 3 S. 61; *East Lothian Bank* v. *Turnbull*, 1824, 3 S. 62; *National Ex. Co.* v. *Easton*, 1851, 14 D. 96.

(*c*) *Drummond* v. *Thomson's Trs.*, 1834, 12 S. 620; *Turnbull* v. *Allan*, 1833, 11 S. 487, affr 1834, 7 W. and S. 281; *Bunten* v. *Barclay*, 1854, 16 D. 1002.

(*d*) *Burness* v. *Pennel*, 1849, 6 Bell's App. Ca. 541; *Affirmation of Forth Marine In. Co.* v. *Burness*, 1848, 10 D. 689.

(*e*) *Sheffield Ra. Co.* v. *Woodcock*, 7 M. and W. 574; *London Grand Junc. Ra.* v. *Graham*, 1 Q. B. 271; *Cheltenham Ra. Co.* v. *Daniel*, 2 Q. B. 281.

with the consent of the board of directors as required by their rules, in respect that this rule had not been for years before observed; and that they were bound by the acts of their own officers, who had permitted the irregular transfer (*a*).

But where non-compliance with the regulations of transfer is pleaded by the party for whose behoof they were framed, they will be very strictly enforced (*b*).

Questions with creditors.

Creditors of the company, when seeking to proceed against alleged shareholders for company debts, have often in England been successfully resisted, on the ground that the regulations necessary to complete the transfer in favour of the alleged shareholder had not been complied with (*c*). These cases were, however, decided at law; it is doubtful whether a court of equity would have enforced the regulations with the same rigour (*d*).

Notice of assignment.

When shares are assigned, intimation of the assignation must be made either to all the partners, or to the manager or directors empowered to receive notices for the company. The mere fact that the manager is himself the assignee, is not equivalent to due intimation to the company (*e*). See a case of circumstances in which a party for whom shares were purchased in a company while he was abroad, and who repudiated the transaction on his return, but afterwards withdrew his repudiation, was held still entitled to do so (*f*).

Form of transfer.

In the case of incorporated companies, the form of transfer furnished by the instrument of incorporation is generally convenient and free from all unnecessary prolixity. It should always be adopted; for although other modes may suffice, transfers differing from the prescribed form in essentials, and characterized by complexity, need not be registered by the company (*g*).

Position of transferree.

A transferree is said to come exactly in place of his transferrer,

(*a*) *Shortridge* v. *Bosanquet*, 16 Beav. 84; *Bargate* v. *Shortridge*, 5 House of Lords Cases 297; *Turnbull* v. *Allan and Son*, 1833, 11 S. 487, aff. 1834, 7 W. and S. 281.

(*b*) *Sir J. Gibson Craig* v. *Aitken*, 1848, 10 D. 576. See also *M'Arthurs* v. *M'Brair*, 1844, 6 D. 1174.

(*c*) *Moss* v. *Steam Gondola Company*, 17 C. B. 180; *Ness* v. *Angas*, 3 Ex. 805; *Ness* v. *Armstrong*, 4 Ex. 21; *Bailey* v. *Universal Prov. Association*, 1 C. B. N. S. 557.

(*d*) See *Bargate* v. *Shortridge*, as decided by Lord St Leonards, 5 House of Lords Cases 297.

(*e*) *Hill* v. *Lindsay*, 1846, 8 D. 472.

(*f*) *Brechin Gas Co.* v. *Whitson*, 1854, 17 D. H. of L. 6, 26 Jur. 417.

(*g*) *Copeland* v. *North-East. Ra. Co.*, 6 E. and B. 277; *R.* v. *General Cemetery Co.*, 6 E. and B. 415.

so that he is bound by the past acts of his author as well as by their future consequences (*a*).

Illegal transfers.

There is nothing illegal in the sale of shares, or even of scrip (*b*); but sales of either, made with the view of profiting by gambling on the rise and fall of the market, are illegal, as gaming and wagering contracts, under 8 and 9 Vict. c. 109, s. 18 (*c*); and if the company itself is illegal, so also will be the sale of its shares or scrip (*d*).

Writing.

It has been held in England, that a contract for the sale of scrip or shares is valid, though not reduced into writing (*e*). A parole agreement having been followed by a note subscribed and delivered at the time, agreeing to take a certain number of shares or any proportion of them, the contract was held completed by tender of a certain number, though there was no written acceptance (*f*). A written contract for the sale of shares must be stamped (*g*).

Sales by brokers.

Brokers are generally employed in the purchase and sale of shares and scrip. They are regarded by the usages of the Stock Exchange as principals in their dealings with each other. Their employers are presumed to know this, and must therefore, in the absence of an agreement to the contrary, indemnify them for any losses incurred on their account. Such rules are, however, founded on proof of usage (*h*).

A broker employed by a shareholder to sell stock is not bound either at common law or under the Company Clauses Act to see the transfer registered in the books of the company; and is therefore not liable to relieve the shareholder of payment of calls made

(*a*) *Ffooks* v. *South-West. Ra.*, 1 Sm. and G. 142; *Mayhew's* case, 5 De G. M. and G. 837.

(*b*) *Ex parte Barclay*, 4 E. Jur. N. S. 1042; *ex parte Grisewood*, 5 E. Jur. 1191.

(*c*) *Grizewood* v. *Blane*, 1851, 11 C. B. 539. In the case of *Foulds* v. *Thomson*, 1857, 19 D. 801, some doubts appeared to be entertained whether this applied to the broker who carried through the transactions; but see the later cases, *ex parte Phillips*, 1860, 2 De G. F. and J. 634, and *Barry* v. *Croskey*, 1861, 2 J. and H. 1.

(*d*) *Buck*, 1 Camp. 547; *Josephs* v. *Pebrer*, 3 B. and C. 639.

(*e*) *Tempest* v. *Kilner*, 3 C. B. 249; *Watson* v. *Spratley*, 10 Ex. 222; *Bligh* v. *Brent*, 2 Y. and C. Ex. 268.

(*f*) *Wilson* v. *Walker*, 1856, 18 D. 673.

(*g*) *Knight* v. *Barber*, 16 M. and W. 66; 23 and 24 Vict. c. 111.

(*h*) *Bayliffe* v. *Butterworth*, 1 Ex. 425; *Sutton* v. *Tatham*, 10 A. and E. 27; *Bayley* v. *Wilkins*, 7 C. B. 886; *Pollock* v. *Stables*, 12 Q. B. 765; *Broom* v. *Hall*, 7 C. B. N. S. 503.

on him from the transfer not being registered and his name remaining on the register (*a*). A broker purchased certain railway shares for his constituent, upon which there was an unpaid call; the constituent on notification acquiesced in the transaction, received delivery of the transfer, and retained it. The purchaser having failed to pay the call, the broker advanced the amount and sued his principal for indemnity. It was held that the principal was liable (*b*).

Contracts to purchase shares.

A contract to purchase shares does not apply to such as are not of the stipulated description (*c*); but it has been held that an order to buy shares was fulfilled by a purchase of scrip, when it was proved that no shares existed in the particular company (*d*). And if the broker fulfils specific instructions to the letter, he is not liable if the shares or scrip turn out worthless, as being unwarrantably issued (*e*). While matters remain entire, the authority to purchase shares may be revoked (*f*); but not after the broker has by contract to purchase incurred personal responsibility (*g*). A broker undertaking to purchase shares in an illegal company, has no recourse against his employer (*h*). To sell shares in a company known not to exist is fraud (*i*); but this does not apply to an insolvent company (*k*). As to brokers incurring liability for not adhering to their instructions, see cases noted below (*l*).

Obligations on buyer and seller.

When a purchaser sues a seller for not transferring shares, he must aver that he was ready to pay and had tendered a proper transfer for execution (*m*); and a seller suing a purchaser for not accepting shares, must aver readiness on his part to transfer (*n*). Sufficient time for the transfer is implied in the contract; what it may be, is proved by the usage of the Stock Exchange (*o*). The

(*a*) *Marr* v. *Buchanan*, 1852, 14 D. 467.

(*b*) *Howden* v. *Kennedy*, 1855, 18 D. 246. See *Mortimer* v. *Millar*, 11 D. 1218.

(*c*) *Westropp* v. *Solomon*, 8 C. B. 345.

(*d*) *Mitchell* v. *Newhall*, 15 M. and W. 308; *Wilkie* v. *Michie*, 1849, 11 D. 1131.

(*e*) *Lamert* v. *Heath*, 15 M. and W. 486.

(*f*) *Fletcher* v. *Marshall*, 15 M. and W. 755.

(*g*) *M'Ewen* v. *Woods*, 11 Q. B. 13.

(*h*) *Buck*, 1 Camp. 547; *ex parte Neilson*, 3 De G. M. and G. 556.

(*i*) *MacCallum* v. *Turton*, 2 Y. and J. 183; *Kempson* v. *Saunders*, 4 Bing. 5.

(*k*) *Stray* v. *Russel*, 5 E. Jur. N. S. 1295, and 1 E. and E. 188.

(*l*) *Hope* v. *Lyon*, 1853, 2 Stuart 360; *Cullen* v. *Kerr*, 1857, 19 D. 969.

(*m*) *Franklyn* v. *Lamond*, 4 C. B. 637, compared with *Rait* v. *Primrose*, 1859, 21 D. 965.

(*n*) *Hannuic* v. *Goldner*, 11 M. and W. 849.

(*o*) *Stewart* v. *Cauty*, 8 M. and W. 160.

seller is bound to do whatever is required to enable him to transfer; his failure to do so may subject him in damages or avoid the contract (*a*). It is doubtful whether this applies to a broker who *bona fide* makes a purchase in terms of his instructions (*b*). The purchaser, on the other hand, is bound to take the seller's place, and to indemnify him for calls made subsequent to the transfer (*c*). An auctioneer selling shares without giving the real owner's name, is liable personally for due implement of the sale (*d*).

Damages for non-implement of contract.

In actions of damages for not transferring, or for not accepting transfers of shares, the damages are in England usually ascertained by the difference between the contract and market prices as at the date of the breach of contract (*e*); and when damages are claimed for non-delivery of shares for a certain time, or generally for non-delivery by the company of shares at the proper time, the English rule seems to be that the market price of the shares at the date of the trial is the measure of the damages (*f*). No fixed rules can, however, be laid down on this subject; the question is properly one for a jury (*g*). It would appear that, in the absence of a specific agreement to the contrary, the purchaser is entitled to be satisfied that the seller can give a valid title to the shares, not only as regards himself, but as regards the company (*h*).

Specific performance.

In England the equity courts have decreed specific performance of a contract for the sale and purchase of shares, with accounting against the seller, and indemnity against the purchaser (*i*); they have, however, declined to interfere in a similar way between sellers and purchasers of scrip (*k*).

(*a*) *Lloyd* v. *Crisp*, 5 Taunt. 249; *Wilkinson* v. *Lloyd*, 7 Q. B. 27.

(*b*) *Stray* v. *Russel*, 5 E. Jur. N. S. 1295, and 1 E. and E. 188.

(*c*) *Wynne* v. *Price*, 3 De G. and S. 310; *Walker* v. *Bartlett*, 18 C. B. 845; *Shaw* v. *Fisher*, 5 De G. Mac. and G. 596.

(*d*) *Franklyn* v. *Lamond*, 4 C. B. 637.

(*e*) *Stewart* v. *Cauty*, 8 M. and W. 160; *Shaw* v. *Holland*, 15 M. and W. 136; *Tempest* v. *Kilner*, 3 C. B. 253; *Howie* v. *Anderson*, 1848, 10 D. 355.

(*f*) *Watt* v. *Mitchell*, 1839, 1 D. 1157; *Dunlop* v. *Higgins*, 1848, 9 D. 1407; *Baird* v. *Reilly*, 1855, 18 D. 734; *Dickson* v. *Henderson*, 1849, 12 D. 306. See *Robinson* v. *M'Cullochs*, 1808, 15 F. C. 74.

(*g*) *Owen* v. *Routh*, 14 C. B. 327; *Cockerell* v. *Van Diemen's Land Co.*, 18 C. B. 454.

(*h*) *Stevens* v. *Guppy*, 3 Russ. 171; *Shaw* v. *Fisher*, 2 De G. and S. 11; *Morris* v. *Kearsley*, 2 Y. and C. Ex. 139.

(*i*) *Duncuft* v. *Albrecht*, 12 Sim. 189; *Wilson* v. *Keating*, 5 E. Jur. N. S. 815, 27 Beav. 121, 4 De G. and J. 588; *Beckitt* v. *Bilbrough*, 8 Ha. 188.

(*k*) *Columbine* v. *Chichester*, 2 Ph. 27; *Jackson* v. *Cocker*, 4 Beav. 59.

Transfers in blank.

In the share market it is common to transfer shares by instruments blank in the transferree's name. They may thus be passed from hand to hand through any number of purchasers, until at length one inserts his name. In England it has been held, that where the constitution of the company requires the transfer to be by deed, conveyances of this kind are at law mere nullities (*a*); but in equity it has been held, that though there was no sale, there was a contract to purchase, and specific performance has been decreed against the purchaser (*b*). This view has been given effect to even in a question with the seller's assignee in bankruptcy, who claimed the shares as still untransferred (*c*). It does not appear that any question of this kind has yet arisen in the law of Scotland. The provisions of the Act 1696, c. 25, would not nullify the deed, as they apply only to bonds. When shares have been transferred by deed blank in the description of the shares, the English equity courts have refused to interfere to rectify mistakes or even frauds thereby occasioned (*d*).

False representations.

If a party is induced to purchase shares on false representations, this will avoid the transaction, if the company was a party thereto; and will in any view ground damages against the seller by whose misrepresentations the fraud was brought about. But to make an action either of reduction or damages good against a company, it must be averred and proved that the misrepresentation was truly their act (*e*).

Transfer of shares under Act of 1862.

As regards companies formed under the Act 1862, it is provided that transfers are to be made in accordance with the regulations of the particular company (sec. 22). Transfers of shares or other interests of deceased members may be made by their representatives, though they themselves are not members (sec. 24). A certificate under the company's seal is *prima facie* evidence of the title of a member to the shares or stock there specified (sec. 31).

Beyond this, the Act contains no general provisions as to the

(*a*) *Humble* v. *Langston*, 7 M. and W. 517; *Sayles* v. *Blane*, 14 Q. B. 205.

(*b*) *Wynne* v. *Price*, 3 De G. and S. 310; *Cheale* v. *Kenward*, 3 De G. and J. 27.

(*c*) *Morris* v. *Cannan*, 8 E. Jur. N. S. 653.

(*d*) *Tayler* v. *Gt. Indian Ra. Co.*, 4 De G. and J. 559; *Swan* v. *North Brit. Aust. Co.*, 7 H. and N. 603; *ex parte Swan*, 7 C. B. N. S. 400.

(*e*) See, as to this, 'Constitution of Company Obligations.'

transfer of shares; but if the regulations in Table A, Schedule 1, be adopted, the following rules will regulate the mode of transfer.

The instrument of transfer must be executed both by transferrer and transferree, and the transferrer remains holder of the shares until the transferree's name is entered in the register (N. 8). The transfer should be in the form given in the table (*a*) (N. 9). The company may decline to register a transfer by a member who is indebted to them (N. 10). The transfer books are closed during the fourteen days immediately preceding the ordinary general meeting in each year (N. 11). The executors or administrators of a deceased member are the only persons to be recognised by the company as having a title to his shares (N. 12). Persons becoming entitled to shares by reason of the death, bankruptcy, insolvency, or marriage of a member, may be registered on production of such evidence as the company may from time to time appoint (N. 13). Such persons may, instead of being registered themselves, name some other persons to be registered in their place as transferrees (N. 14), by executing an instrument of transfer (N. 15). This instrument must be presented to the company, with such evidence to prove the title of the transferrer as the directors may require, and it will thereupon be registered (N. 16).

Transfer of shares in chartered companies;

When companies are incorporated by royal charter, the conditions and modes of transfer are frequently specified in that instrument. When this is not so, these matters will fall to be regulated by the bye-laws of the company.

in letters patent companies.

In letters patent companies, the Act of 1 Vict. c. 73 appears to contemplate transfers of shares, other than by death or marriage, to be by deed or writing only. When the transfer has been executed, a notice in writing, specifying its date, the distinguishing number of the shares transferred, and the names and places of abode of the transferrer and transferree, must be given to the company, by leaving the transfer, executed by both parties, or some note or memorandum thereof, signed by them, at the principal office of the company (sec. 9). Within three months after receiving this notice, the company must make a return, in the form of Schedule D, to the General Registry Office, Edinburgh, containing

(*a*) It rather appears that the adoption of this form is intended to be compulsory.

the above-mentioned particulars specified in the notice (sec. 10), and this notice is then registered by the Lord Clerk Register or his deputy (sec. 17). When shares are transferred by operation of law, as by death, marriage, etc., the company must, within three months after receiving notice of such transfer, make a corresponding return to the foresaid office, in the form of Schedule C.

Transfer of shares under Act of 1845.

In the case of companies formed under the Act 1845, the following are the statutory provisions:—The transfer of shares or of interest in consolidated stock is by deed duly stamped, containing the consideration truly stated. The form given in the Act may be adopted (sec. 14). The transfers may be executed according to the forms of English or Scottish law, or partly according to the one and partly according to the other (sec. 15). When the deed of transfer is executed, it is delivered to and kept by the secretary, who enters a memorial of it in the 'register of transfers,' and indorses that entry on the deed of transfer. The delivery of the deed completes the transfer; and until this takes place, the vendor is still liable for calls, and the company may still pay him profits; nor is the vendee entitled to vote (sec. 16). A new certificate, or, in the option of the vendee, the old one, with the fact of transfer indorsed and signed by the secretary, is delivered to the vendee (sec. 16). No transfer can be made until all calls are paid (sec. 17). The directors may close the register of transfers during the prescribed period; and if none, then for a period not exceeding fourteen days before each ordinary meeting. Seven days' notice must be given in the prescribed newspaper; and if none be prescribed, then in one circulating near the company's chief place of business (sec. 18). Transfers made after closing of the register are considered as between transferrees and the company to have been made after the ordinary meeting (sec. 18). When the interest in shares has been transmitted by operation of law, or by other lawful means than the statutory transfer, the transmission must be authenticated by a declaration in writing, as provided in the Act. This declaration must state the manner in which, and the party to whom, the share has been transmitted, and must be made and signed by some credible person before a sheriff or justice. The directors may, however, require the authentication to be made in

some other manner. The declaration is left with the secretary, who enters the name of the person entitled under the transmission in the 'register of shareholders;' and for this entry, a small fee, not exceeding the prescribed amount if any, and otherwise not exceeding 5s., may be demanded. It is the authentication which completes the transfer; for until this takes place, the person in right of the transmission is not entitled to share in profits or to vote (sec. 19). When the transmission is by the marriage of a female shareholder, the declaration must contain a copy of the register of the marriage, or other particulars of its celebration, and state the identity of the wife with the holder of the share. If the transmission is by testamentary instrument or by intestacy, the probate of the will, the letters of administration, a testament testamentary or testament dative, as the case may be, or official extracts thereof, must, together with the declaration, be produced to the secretary, who thereupon makes an entry of the declaration in the 'register of transfers' (sec. 20).

Trusts.

The company is not bound to see to the execution of any trusts, whether express or constructive, to which shares may be subject; but the receipt of the party in whose name the share stands in the books of the company, or when it stands in the names of more than one, the receipt of the party first named in the register of shareholders and then surviving, is a sufficient discharge, notwithstanding the existence of any trusts, and whether notice of them has or has not been given. The company is not bound to see to the application of money paid upon such receipts (sec. 21).

III. RETIREMENT AND SURRENDER OF SHARES.

Partnership at will and for a term.

Where a partnership is at will, and not for a fixed term, any of the partners may retire without the consent of the others; for he may operate a dissolution at any time he sees fit (*a*). But if it be for a definite term, he cannot retire without the consent of his co-partners until the period of its agreed upon duration has elapsed, or a dissolution has been brought about in some other way. To obviate questions that might arise on the retirement of a partner, and which might involve the necessity of a dissolution, it is a usual

(*a*) *Marshall* v. *Marshall*, 1815, 18 F. C. 173.

and most convenient practice to make special provisions in the contract for this purpose (*a*).

Retiring by consent.

In all cases a partner may retire from the company, and a shareholder may surrender his shares, if he obtains the consent of his copartners; and this consent may be express, as at a general meeting, or it may be implied from facts and circumstances, or from the company's known practice in similar cases (*b*). But it would seem that consenting to a member retiring or relinquishing his shares is a matter beyond the sphere of ordinary management, and one in which the directors have no power to bind the company, nor a majority the minority of its members. The consent, whether express or implied, must be that of all the members (*c*). Directors, without special authority, cannot buy out shareholders by applying the company funds for that purpose (*d*). If they do so, they are not only liable in repetition of the monies so misapplied, but are held to undertake all liabilities which the outgoing members may have incurred to the company (*e*). Of course directors, like other shareholders, may with their own money buy as many shares as they choose (*f*). And if a shareholder sells to a director, in ignorance of the fact that the latter is purchasing, not with his own but with the company's funds, the transaction will be good *quoad* the shareholder (*g*). A shareholder may at all times retire, when the objects of the company have been changed without his consent, express or implied (*h*).

Acts of 1845 and 1862.

Neither the Company Clauses Consolidation (Scotland) Act, nor the Act of 1862, make any provisions for the retirement of a member by surrender of his shares to the company.

(*a*) *Wright* v. *Gardner's Trs.*, 1831, 9. S. 721.

(*b*) *Bodmin United Mines*, 23 Beav. 370; *Bunten* v. *Barclay*, 1854, 16 D. 1002; and see *Wilson* v. *Bruce*, 16 D. 171.

(*c*) *Munt's* case, 22 Beav. 55; *Richmond's* case, 4 K. and J. 305; *Stanhope's* case, 3 De G. and S. 198; *Holt's* case, 1 Sim. N. S. 389; *Morgan's* case, 1 De G. and S. 750.

(*d*) *Walker's* case, 2 E. Jur. N. S. 1216; *Hodgkinson*, 5 E. Jur. N. S. 478; *Burt*, *ibid.* 612.

(*e*) *Evans* v. *Coventry*, 2 E. Jur. N. S. 557.

(*f*) *Haddon* v. *Ayres*, 5 E. Jur. N. S. 408.

(*g*) *Bagge's* case, 13 Beav. 162; *ex parte Nicol*, 5 E. Jur. N. S. 205.

(*h*) *Clarke* v. *Hart*, 6 House of Lords Cases 633; *Featherstonhaugh* v. *Fenwick*, 17 Ves. 309.

IV. EXPULSION OF MEMBERS, AND FORFEITURE OF SHARES.

However much a partner may misconduct himself, or however undesirable it may be to continue him in the concern, it is only by dissolution that he can be got rid of if he insists on remaining a partner. To meet cases of this kind, clauses of expulsion are sometimes inserted in the partnership contract, by which power is conferred on the partners, or a certain majority of them, to expel any of their number in certain specified circumstances. Clauses of a similar kind are often introduced into the articles of association, or other instrument by which companies are formed, empowering the company or its directors to declare the shares of a member forfeited on his failure to comply with certain regulations. Such clauses are construed *strictissimi juris*, because of the great facilities they afford for abuse (*a*). To be effectual, the power of expulsion must be exercised with the utmost *bona fides*, and with a minute attention to all the regulations and formalities prescribed (*b*). This power may be abused not only to the prejudice of an obnoxious shareholder, but in order to relieve a favoured member from liabilities. In either case, the forfeiture will be declared invalid if *mala fides* can be established (*c*).

Clauses of expulsion.

If the forfeiture is valid, the shareholder ceases to be a member of the company to all intents and purposes from its date. He can no longer take any share in the management, or draw dividends; and, on the other hand, though he may be sued for calls made prior to his forfeiture, he is liable for none made subsequent to that event, nor can he be made a contributory on winding up (*d*).

Consequences of expulsion.

The invalidity of an alleged forfeiture may be established at the

Invalidity of forfeiture.

(*a*) *Munro* v. *Cowan and Co.*, 1813, 17 F. C. 354.

(*b*) *Blisset* v. *Daniel*, 10 Ha. 493; *Smith* v. *Mules*, 9 Ha. 556; *Clarke* v. *Hart*, 6 House of Lords Cases 633; *Watson* v. *Eales*, 23 Beav. 294; *Richmond's* case, 4 K. and J. 305; *Harris*, 20 Beav. 384.

(*c*) *Richmond's* case and *Painter's* case, 4 K. and J. 305.

(*d*) *Beresford's* case, 3 De G. and S. 175; *Baily's* case, 15 E. Jur. 29. See *Great Nor. Ra. Co.* v. *Clark*, 1856, 18 D. 660; *Great Nor. Ra. Co.* v. *Inglis*, 1853, 15 D. 532; *Lindsay* v. *Great Nor. Ra. Co.*, 1851, 13 D. 457.

instance of the shareholder (*a*), at that of the company (*b*), and at that of creditors, whether they be those of the company or of the shareholder (*c*); for cases may easily be conceived in which all these may have an interest. An action of damages lies against the company for an illegal or unwarrantable forfeiture, and it is no answer to this that the forfeiture is invalid (*d*). A company may be interdicted from carrying into effect a declaration of forfeiture made *de recenti* (*e*). Clauses of forfeiture providing that shares may be forfeited for non-payment of calls, are intended for the benefit of the company, and do not enable shareholders to escape from the company by refusing to pay calls (*f*).

Forfeiture of shares under the Act 1862.

No statutory provisions are made in the Companies Act of 1862 for the forfeiture of shares; but if the regulations of Table A, Schedule 1, be adopted as the articles of association, the company will be possessed of a body of regulations admirably calculated to ensure a fair and equitable procedure in this matter. The object of the powers of forfeiture contemplated in these regulations is to ensure payment of calls. If a call be not paid on the appointed day, a forfeiture of the defaulting member's shares may be declared. The procedure is as follows:—A notice must be served on the defaulter, as provided by the Act. This notice must contain a requisition to pay the call with interest and expenses on or before a certain day, at the registered office, or some other place where the calls are usually made payable, under penalty of forfeiture. If obedience is not given to this requisition, the shares may be forfeited by a resolution of the directors to that effect, passed subsequently to the day mentioned in the notice. The shares so forfeited become the property of the company, and may be disposed of as a general meeting shall direct. A declaration in writing, narrating the steps of procedure up till the declaration of forfeiture, and the declaration itself, is sufficient evidence against the defaulter;

(*a*) *Blisset* v. *Daniel*, 10 Ha. 493; *Clarke* v. *Hart*, 6 House of Lords Cases 633; *Munro* v. *Cowan and Co.*, 1813, 17 F. C. 354.

(*b*) *Richmond's* case and *Painter's* case, 4 K. and J. 305.

(*c*) *Barton's* case, 4 De G. and J. 46.

(*d*) *Catchpole* v. *Ambergate Ra. Co.*, 1 E. and B. 111.

(*e*) *Watson* v. *Eales*, 23 Beav. 294; compare with *Prendergast* v. *Turton*, 1 Y. and C. C. C. 98.

(*f*) *Richmond's* case and *Painter's* case, 4 K. and J. 305; *Moore* v. *Rawlins*, 6 C. B. N. S. 289.

and this document, and the receipt of the company for the price of the forfeited shares, constitute a good title to a purchaser, who, on receiving a certificate of proprietorship, is deemed the holder of them, free from all calls due prior to the purchase. He is not bound to see to the application of the purchase money, and his title is not affected by any irregularity in the proceedings. It will be observed that the whole procedure is very similar to that provided under the Company Clauses Consolidation Act, to be afterwards noticed.

Forfeiture in chartered and letters patent companies.

No statutory provision exists as to forfeiture of shares in relation either to chartered companies or to associations privileged by letters patent. The exercise of such a power, therefore, seems *ultra vires* of such companies where it is not specially conferred in the charter, or where in letters patent companies it does not form part of the contract of association.

Forfeiture under the Act of 1845.

By the Companies Clauses Consolidation (Scotland) Act, 1845, it is provided that shareholders failing to make payment of calls with interest for two months from the date when they became payable, may have them declared forfeited by the directors, whether the company have sued for the amount or not (sec. 30). Notice of intention to forfeit must, however, be given by the directors twenty-one days before declaring the forfeiture. This notice may be left at or transmitted by post to the shareholder's usual or last place of abode; and if his residence is not known, or if he be abroad, notice must be given in the *Edinburgh Gazette* (sec. 31), and in a newspaper circulating in the district where the company's principal place of business is situated (sec. 40). The forfeiture does not take effect till it has been confirmed at a general meeting held after expiration of the two months (sec. 32). The shares may be directed to be sold at that or any subsequent general meeting (sec. 32). The shares are sold either by public auction or private contract. Any shareholder may purchase (sec. 33). A declaration in writing, by some credible neutral person, before the sheriff, of the call, the notice, and the forfeiture in default of payment thereof, having been made and confirmed, is sufficient evidence of the facts set forth, and, together with the treasurer's receipt for the price of the shares, constitute a good title to the purchaser. He is then entitled to a certificate of proprietorship,

becomes the holder, and is discharged from all calls due prior to the purchase; he is not bound to see to the application of the purchase money, nor is his title affected by any irregularity in the proceedings (sec. 34) (*a*).

No more shares can be sold than are sufficient to pay the calls, interest and expenses of the procedure; any surplus that may exist must be paid to the defaulter (sec. 35). If payment is made before sale, though after forfeiture, the shares revert to the quondam defaulter (sec. 36) (*b*).

The Companies Clauses Act, 1863 (*c*), confers a power of cancelling shares on companies incorporated either before or after that date, provided they obtain a special act incorporating Part 1 of that statute. In virtue of its provisions, shares forfeited under the Act 1845 may, if the directors are unable to sell these for a sum equal to the arrears of calls, interest, and expenses, be cancelled by resolution of a general meeting (secs. 3 and 4). A written declaration by any sheriff or justice that such sale could not be effected on the Stock Exchange of Edinburgh, if none in especial is prescribed, is sufficient evidence to warrant cancellation (sec. 5). This cancellation divests the shareholder of all right and interest in the cancelled shares, but does not affect his liability for unpaid calls, interest, and expenses, as at the date of cancellation (sec. 6). Yet from this amount the value of the cancelled shares as this stands at the time must be deducted; and if payment is made before cancellation, the shares revert to their former owners (sec. 7). The company may also, when shares have been forfeited, or when sums payable on shares remain unpaid, cancel them with consent of the holders; but in that case all liabilities attaching to them are at once extinguished (sec. 8). The company also accept surrenders of shares which have not been fully paid up (sec. 9); but no money is to be received either for cancellation or surrender (sec. 10). New shares may be issued in lieu of those cancelled or surrendered, provided their aggregate nominal amount does not exceed that of the latter (sec. 11).

(*a*) See *Lindsay* v. *G. N. Ra. Co.* 1851, 13 D. 457, 1 Macq. 112; *G. N. Ra. Co.* v. *Inglis*, 1851, 13 D. 497; 1853, 15 D. 532.

(*b*) *Great Nor. Ra. Co.* v. *Clark*, 18 D. 660.

(*c*) 26 and 27 Vict. c. 118.

CHAPTER VI.

CALLS.

THE subscribers to joint-stock companies are not in general required to pay up the full amount of their contributions at once, but only by instalments as *called* for by the company from time to time. The word 'call' is used in three senses. It denotes—1. The fact that a demand has been made; 2. The aggregate amount demanded; 3. The proportion of this amount payable by each shareholder in respect of his shares or his guarantee. Meaning of term.

If the company is unlimited, calls may be made upon the members not only to the extent of the nominal capital, but for as much beyond this as may be necessary to liquidate the company debts. If the company be limited, the members are not liable to pay calls beyond their shares or guarantee, unless it can be shown that they have agreed to do so *per expressum* or by implication, *e.g.* by allowing the directors to contract company debts which can only be met in this manner.

I. MODE OF MAKING CALLS.

By whom and in what manner calls may be validly made, can only be ascertained by reference to the provisions of the act, charter, or articles of association, by which the company's constitution is regulated. It may be observed, however, generally, that calls made by persons not empowered to do so are mere nullities (*a*); and that when calls are directed to be made by a certain number of persons collectively, a call made by a less number will not in Who may make calls.

(*a*) *South-East. Ra. Co.*, 12 A. and E. 497. See *Miles* v. *Bough*, 3 Q. B. 845; *Edinburgh Ra. Co.* v. *Hebblewhite*, 6 M. and W. 707.

general be held valid (*a*). All the prescribed formalities must be complied with; for though their want may sometimes be supplied by equivalents, and defenders in actions for calls may sometimes be prevented from pleading informalities by conduct or acquiescence, such contingencies are not to be relied on. When the power to make calls is lodged in directors, a call made by such as possess this character for the time being is valid, though objections may exist to the validity of their appointment (*b*); and the Court has refused to sustain the objection, that the whole directors by whom the call was made had not been elected at one meeting (*c*).

Act 1862. Regulation of Table A, Schedule 1.

No rules upon this subject are laid down in the body of the Act of 1862, and the company are left free to adopt such regulations as they choose in their articles of association. The following regulations are, however, to be found in Table A, Schedule 1; and as they are admirably suited for practice, they should always, if possible, be adopted in their entirety. The directors may from time to time make such calls in respect of unpaid monies or shares as they see fit. Twenty-one days' notice must be given of such call; and the places where and the persons to whom calls are to be paid are fixed by the directors (Rule 4). The call is deemed to be made when the resolution is passed (Rule 5). Unpaid calls bear interest at 5 per cent. (Rule 6). The directors may receive from members willing to do so, the whole or any part of the monies due on their shares beyond the amount of the call; and the company shall in that case pay them interest, at such rate as may be agreed upon, on the excess of sums so paid over the amount called up (Rule 7).

Act 1856.

The provisions in the Companies Act of 1856 are very similar to those of the Companies Clauses Consolidation Act. They are to be found in Table B, No. 2 and No. 46.

Letters Patent Acts.

No provisions on this subject are to be found in the Letters Patent Acts.

The provisions of the Act 1845 are as follows:

Act 1845.

Calls are directed to be made by the company (sec. 23); but

(*a*) *Kirk* v. *Bell*, 16 Q. B. 290; *Thames Dock Co.*, 4 Man. and Gra. 552.

(*b*) *Swansea Dock Co.*, 20 L. J. Ex. 447. At least such is the case in companies formed under the Act of 1845, which contains a clause to this effect.

(*c*) *Hutcheson* v. *Halkett*, 1847, 10 D. 150.

where the special act does not require calls to be made by general meeting, they are in practice made by the directors, whose act is held to be that of the company (*a*). It would also seem that they may delegate this power to a committee (*b*). Calls may be made as the company see fit, and at such periods as they deem necessary. But in doing so, care must be taken that the provisions and restrictions of the general and special acts are strictly complied with. The special act commonly fixes the amount of each individual call, the aggregate amount of calls to be made in one year, and the interval between successive calls; and by the general Act it is provided that in all cases twenty-one days' notice at least must be given of each call (sec. 23). The company also appoint the persons to whom, and the times and places at which, payment is to be made.

Calls payable by instalments.

It has ultimately been fixed in England, after some conflicting judgments, that there is no legal objection to a call being made payable by instalments (*c*). But it has been held, in Queen's Bench, that when the times of making and the amount of calls have been prescribed by the special act, it is irregular to make more than one call at a time (*d*). Unless prohibited by the special act, calls may be made prospectively; that is to say, the resolution to make calls may be prospective (*e*). When calls are made payable by instalments, no action can be maintained until the last instalment is due (*f*); and no forfeiture is incurred until there has been a failure to pay the last instalment (*g*). Calls must be made equally on all the shareholders (*h*).

Resolution and notice.

As regards making of calls, two separate acts are observable: 1. The resolution that a call shall be made; and 2. The *notice*

(*a*) *Ambergate Ra. Co.*, 19 L. J. Ex. 89, 4 Ex. 540; *Southampton Ra. Co.*, 2 Ra. Ca. 215; *ex parte Tooke*, *per* Erle, J., 6 Ra. Ca. 1.

(*b*) *Great Nor. Ra. Co.*, 1850, 12 D. 1194; 1852, 24 Jur. 434, 1 Macq. 112.

(*c*) *London and North-West. Ra. Co.*, 6 Ra. Ca. 494; and *Birkenhead Ra. Co.*, 6 Ra. Ca. 498; overruling previous case of *Ambergate Ra. Co.*, 14 E. Jur. 625, and 5 Exch. 459.

(*d*) *Stratford and Moreton Ra. Co.*, 2 B. and Ad. 518; *Smith* v. *Goldsworthy*, 4 Q. B. 430, and 12 Law Jour. Q. B. 192.

(*e*) *Sheffield, Ashton, and Manchester Ra. Co.*, 7 M. and W. 574, 2 Ra. Ca. 522.

(*f*) *London and North-West. Ra. Co.*, 6 Ra. Ca. 497, *per* Martin, B.

(*g*) *Ibid.*

(*h*) *Preston* v. *Grand Collier Dock Co.*, 2 Ra. Ca. 335.

Resolution.

served in consequence on those liable. It has been ultimately decided in England, that the *resolution*, as evidenced by the minutes of meeting, is the '*call*' in the sense of the general Act (*a*). This construction has accordingly been applied in determining questions of interval between calls, and liability for calls as between seller and purchaser (*b*). Its application is not, however, in some cases, free from difficulty. The resolution to make calls must be entered in the minutes of meeting, and authenticated by the signature of the chairman (sec. 101). In practice, rough notes are taken at the time, which, being afterwards extended as minutes in the proper books, are signed by the chairman at the next meeting. If the same person be chairman at both meetings, this method of procedure appears unobjectionable (*c*). The resolution is generally, as appearing in the minutes, a bare statement that a call of a given amount *per* share, payable on a certain day, is made on the proprietors. It is not necessary that it should specify the place where, or the person to whom, payment is to be made, provided these particulars be sufficiently set forth in the subsequent notice (*d*). Care should be taken, when the special act specifies different classes of persons as liable to pay calls, that the resolution be so worded as to embrace the whole (*e*).

Notice.

The resolution is followed by a '*notice*' to the proprietors, which must specify the time and place at which, and the party to whom, payment is to be made. The notice need not bear the company's seal, but must either be signed by two directors, or by the treasurer or secretary. It may either be in writing or in print, or partly in both (sec. 141). It has been decided that the *printed* signature of the proper officer is a sufficient compliance with the statutory requirements (*f*). When not dispensed with by the special act,

(*a*) *Ex parte Tooke, re Londonderry, etc., Ra. Co.*, 6 Ra. Ca. 3, 13 Q. B. 998.

(*b*) See *North American Colon. Association of Ireland*, 19 Law Jour. Q. B. 427.

(*c*) *Southampton Dock Co.*, 1 Man. and Gr. 448; *London and Brighton Ra. Co.*, 2 Man. and Gr. 674; *Miles* v. *Bough*, 3 Q. B. 845, and 12 Law Jour. Q. B. 74.

(*d*) *Whitehaven and Furness Ra. Co.*, 1850, 12 D. 829, aff. 7 Bell's App. 79, 22 Jur. 483. The affirmance was on a specialty, but the decision is supported by many English cases. *Newry and Enniskillen Ra. Co.*, 1848, 5 Ra. Ca. 278, and cases there referred to.

(*e*) *West London Ra. Co.* v. *Bernard*, 22 Law Jour. Q. B. 68.

(*f*) *Great North Ra. Co.* v. *Inglis*, 1850, 12 D. 1194, aff. 1852, 24 Jur. 434, 1 Stuart 749, 1 Macq. 112.

these notices must be served on the shareholders individually (*a*). The special act sometimes substitutes advertisement in the newspapers for personal service, and sometimes requires both forms of publication. The forms necessary to be observed in giving these notices will be found in the appendix.

Actions for calls.

In actions for calls, it is necessary to prove that they were made at the period prescribed by the Act; and it would seem that a director, when sued for a call, may plead its illegality, though he himself was a party to its being made (*b*). But in some cases the defender will be estopped from pleading that the call has not been proved, as *e.g.*, where he has expressly promised to pay the calls for which he is sued (*c*). It is correct pleading to set forth that the calls sued for were made by the parties (whoever they may be) authorized to make them, and that notice was duly given as prescribed; but an objection to the relevancy, for want of specification in this respect, has been overruled (*d*), and it is too late to insist on it after verdict (*e*).

II. LIABILITY FOR CALLS.

General rules.

As a general rule, it is only persons who have acquired the character of shareholders or members of a formed company who are liable for calls: for until it is duly formed, the company cannot be said to hold the character either of debtor or creditor; and until a person has joined it, he cannot be said to be liable in contribution either to its capital or in liquidation of its debts. What is necessary to the formation of a company, and what to constitute membership, has been considered in the earlier chapters of this treatise. But it must be observed that persons are sometimes rendered liable for calls even before they have become shareholders. When this happens, it arises from some contract to that effect, into which they have entered either expressly or by implication. Thus, allottees of shares have been in certain circumstances found liable in payment

(*a*) See *Edinburgh and Leith Ra. Co.*, 6 Me. and W. 716; *Painter*, 3 Ad. and E. 433; *Miles* v. *Bough*, 3 Q. B. 845.

(*b*) *Stratford Ra. Co.*, 2 B. and Ad. 518.

(*c*) *Miles* v. *Bough*, 3 Q. B. 845.

(*d*) See *Burgh* v. *Legge*, 5 M. and W. 421.

(*e*) *Miles* v. *Bough*, *supra*.

of calls before they attained the character of proper shareholders (*a*). Such questions, when they arise in companies not formed under statute, must be determined by the special circumstances of the case.

Companies Act, 1862.

The Companies Act, 1862, declares calls to be debts due by shareholders to the company, and to be in the nature of specialty debts in England and Ireland (sec. 16); but beyond this, it makes no provision on the subject. If, however, the regulations of Table A be adopted, the provisions will be as follows: Such calls as they see fit may be made by the directors from time to time on the members in respect of money unpaid on their shares, provided twenty-one days' notice be given of each call. Payment must be made at the times and places appointed by the directors (No. 4). The date of the call is the date of the resolution to make it (No. 5). The notice may be sent by post or served personally (No. 95). Interest at 5 per cent. is exigible on calls not paid on or before the appointed day (No. 6). Calls may be paid in advance; and in that case interest may be allowed on the excess of such advance over the amount called up (No. 7). Shares may be forfeited for non-payment of calls; but for this purpose the prescribed procedure must be fully carried out (Nos. 17 *et seq.*).

Letters Patent Acts.

The Letters Patent Acts contain no provisions on the subject of calls.

Companies Clauses Act, 1845.

By the Companies Clauses Act, 1845, all parties who fall under the statutory definition of shareholders are liable for calls (secs. 8, 22, and 23). The provisions of secs. 22 and 23 are peculiar, and it has been supposed that they were intended to render mere subscribers, in opposition to proper shareholders, liable for calls (*b*); but it is very doubtful if, upon a sound construction, this can be held to be the meaning of the Legislature. It would rather seem that the clauses in question merely mean that persons, by subscribing to the undertaking, render themselves liable to be made contributories by being registered as shareholders. As the expression used is not subscribers for shares, but 'persons who have subscribed monies towards the undertaking,' it is possible that the Legislature meant not inchoate shareholders, but parties who had agreed to advance money by way of loan to

(*a*) *Duke* v. *Dive*, 1 Ex. 36; *Aldham* v. *Brown*, 6 E. Jur. N. S. 41.
(*b*) Lindley 538.

the company on certain terms, but without the intention of becoming shareholders.

Requisites to create liability.

Be this as it may, it is to be observed, that no one can be sued for calls *as a shareholder*, whether he be transferree of scrip (*a*), transferree of shares (*b*), or even original allottee (*c*), unless his name has been entered on the sealed register of shareholders before the call was made (*d*). Neither can he be sued for calls made after a transfer in favour of another has been registered; so that it is only for calls made while a person's name stands on the register that he is liable to the company (*e*). The Act, in fact, in authorizing calls to be made on shareholders, seems to assume registration to be necessary to give the character of shareholder (*f*); and apart from the statutory enactment, the reason of this rule is very apparent. Until registration, a person has no active title in the company: he can neither vote at meetings nor receive dividends (secs. 16 and 19). To render him liable, therefore, in calls made before registration, would be to subject him in what he had no voice in imposing, and to hold him bound to a company which was not bound to him.

Sealing of register.

It is also necessary that the register be sealed before the call is made; for without this, registration creates no liability (sec. 9) (*g*). When the register consists of several volumes, and the last contains a recapitulation of their contents, the affixing of the seal to this recapitulation is sufficient (*h*).

Naked transfer not sufficient.

The mere fact, therefore, of a transfer having been executed does not relieve the seller from liability for future calls till that transfer has been entered on the sealed register (*i*). And in like manner, though an original allottee has disposed of his scrip before passing of the special act, but has then been registered by the

(*a*) *Newry and Enniskillen Ra. Co.*, 12 E. Jur. 101, 5 Ra. Ca. C. 275; *Birmingham Ra. Co.*, 1 Q. B. 256; *London Grand Junction Ra. Co.*, *ibid.* 278.

(*b*) *Sayles* v. *Blane*, 6 Ra. Ca. 79. See also *Corden* v. *Universal Gas Light Co.*, 6 D. and L. 379; *Birkenhead Ra. Co.*, 6 Ra. Ca. 47.

(*c*) Previous cases.

(*d*) See *Cal. Ra. Co.* v. *Lockhart*, 1854, 17 D. 25.

(*e*) *Belfast Ra. Co.*, 1 Ex. 739; *Birkenhead Ra. Co.*, 4 Ex. 426, and 6 Ex. 626; *Londonderry Ra. Co.*, 13 Q. B. 998; *Great Nor. Ra. Co.*, 1851, 13 D. 1315, aff. 1852, 24 Jur. 434.

(*f*) Compare secs. 8 and 23.

(*g*) *Cheltenham and Great West. Ra. Co.*, 9 C. and P. 55; *Great Nor. Ra. Co.*, *supra*.

(*h*) *Great Nor. Ra. Co.*, *supra*.

(*i*) *Sayles* v. *Blane*, 6 Ra. Ca. 79; *Corden* v. *Universal Gas Light Co.*, 6 D. and L. 379; *Anderson* v. *Cullen*, 1849, 11 D. 1264.

company in place of the scrip-transferree, he is liable for all calls made while the latter remains unregistered (*a*). When this is done, the transferrer ceases to be liable for all future calls (*b*). But his obligation to pay such as were made while his name remained on the register, would not seem to be devolved on his transferree in a question between himself and the company (*c*). The question has accordingly risen, whether a purchaser of shares, through whose delay to get himself registered liability has been incurred by the seller, is bound to relieve the latter, or indemnify him for payments made in such circumstances. In *Anderson* v. *Cullen*, the Court of Session decided this question substantially in the affirmative (*d*); and though in *Humble* v. *Langston* (*e*) the English Court of Exchequer took an opposite view, seemingly on the ground that in the contract notes no time for completing the contract was specified, it has frequently been decided in Chancery that the vendee is bound to pay calls made on the vendor since the sale, and generally to do all that is necessary to relieve him from subsequent liability (*f*).

Consequence of non-registration.

A similar question occurs between an original subscriber and a scrip-transferree, when the former has been rendered liable for calls in consequence of the latter not coming forward to register. In *Jackson* v. *Cocker* (*g*), it was held that a court of equity could not compel the scrip-holder in such circumstances to indemnify the original subscriber, because there was no contract express or implied to this effect. But in the later case of *Jacques* v. *Chambers* (*h*), Knight Bruce, Vice-Chancellor, expressed an opinion, that if no other liability attached to the vendee, it must be taken to have been part of the contract that he was to indemnify the vendor from the consequences of his name being placed on the register.

Question between subscriber and scrip-transferree.

When (as generally happens) it forms a regulation of the company that shares shall not be transferred till all previous calls have

Payment of previous calls.

(*a*) *Midland Great West. Ra. Co.*, 5 Ra. Ca. 76, 16 L. Jour. 1847, Exch. 166; *London Grand Junct. Ra. Co.*, 2 Ma. and Gr. 606; *East Lothian Ra. Co.*, 1849, 11 D. 1184.

(*b*) Same cases.

(*c*) *Mangles* v. *Grand Dock Co.*, 2 Ra. Ca. 359.

(*d*) 1849, 11 D. 1264.

(*e*) 2 Ra. Ca. 533, 7 M. and W. 517. See also *Burnet* v. *Lynch*, 5 B. and C. 589.

(*f*) *Wynne* v. *Price*, 13 E. Jur. 295, 5 Ra. Ca. 465; *Shaw* v. *Fisher*, 5 Ra. Ca. 461; *Cheale* v. *Kenward*, 3 De D. and J. 27.

(*g*) 4 Beav. 59.

(*h*) 4 Ra. Ca. 499; and see *Beckit* v. *Bilbrough*, 8 Ha. 188.

been paid, the company are not bound to register the transferree until this regulation has been complied with; and the seller will accordingly continue liable to the company, not only for all past calls, but for such as may still be made while the purchaser remains unregistered (*a*).

Evidence of register may be rebutted.

Persons whose names appear on the register are presumed to be shareholders, and liable for calls accordingly. Yet this presumption may be rebutted; and therefore such as are not properly shareholders are not liable for calls, though the company may have chosen to treat them as shareholders, as by registering them, provided this has been done without their consent, express or implied (*b*). But they may be barred from taking this defence by conduct, adoption, or acquiescence, though the prescribed formalities have not been strictly adhered to (*c*).

Minors.

If minors are registered as shareholders (which they may be, from having received shares by bequest or by purchase), they become *de facto* shareholders, and are entitled to vote by their guardians (sec. 82). Accordingly they cannot escape from the liability to pay calls, on the mere plea of being minors when the calls were made, unless they aver and succeed in proving that they had repudiated the contract either during minority or afterwards *tempestive;* for otherwise it will be presumed that they had ratified the transaction on their coming of age (*d*). In like manner, if they are sued for calls while in minority, and seek to escape liability on that ground, they must state and establish facts and circumstances relevant to take them out of the operation of the statute, *e.g.* fraud; being induced to purchase shares without the authority of their curators, though they had such guardians; and the like (*e*).

Executors.

By sec. 22, the legal representatives of shareholders are made liable for calls. It has been held in England, that when an exe-

(*a*) *Aylesbury Ra. Co.* v. *Thompson*, 2 Ra. Ca. 668.

(*b*) *New Bruns. Ra. Co.*, 4 H. and N. 160; *Galvanized Iron Co.*, 8 Ex. 17; *Shropshire Union Ra. Co.*, 3 Ex. 401. See Constitution of Partnership.

(*c*) *London Gr. Junc. Ra. Co.*, 1 Q. B. 271; *Burnes* v. *Pennell*, 2 House of Lords Cases 497; *Birmingham Ra. Co.*, 1 Q. B. 256.

(*d*) *Cork and Bandon Ra. Co.*, 10 Q. B. 935; *Leeds and Thirsk Ra. Co.*, 4 Ex. 26; *Birkenhead Ra. Co.*, 5 Ex. 114; *Newry and Ennis. Ra. Co.*, 3 Ex. 565.

(*e*) *North-West. Ra. Co.*, 5 Ex. 114. See also *Stikeman* v. *Dawson*, 16 Law Jour. (Chan.) 205.

cutor or administrator is sued for calls made during the testator's lifetime, and while he was registered, the short statutory declaration is not sufficient, but a special count must be framed to meet the facts (*a*). It is probable, therefore, that the averments required by sec. 27, would not in Scotland be held sufficient in such a case, but that the condescendence would have to contain a special averment that the calls sued for against the executor or other representative were made prior to the testator's death, and while his name stood on the register.

It is sometimes a matter of difficulty to determine whether calls made on shares fall ultimately to be paid by the person to whom they have been bequeathed, or are chargeable against the deceased's executry generally. This will fall to be determined by reference to the terms in which the bequest is made (*b*).

Defences.

If a party is made a shareholder in terms of the provisions of an Act of Parliament, he cannot resist payment of calls on the ground that the special act was obtained by fraud (*c*). Nor is it any defence against an action for calls by a registered company, that the company ought not to have been registered (*d*). It is no defence against calls that a shareholder has been induced to become such by fraud on the part of the company. This would require to be established by declarator, or the shares must have been repudiated before the call was made (*e*). Minors are liable for calls on shares to which they have succeeded in railway companies, unless they have repudiated *tempestive*—in Scotland, during the *Quadriennium utile* (*f*). Those who have once become shareholders continue liable for all calls made while they retain that character, until payment, or until the liability has been terminated by agreement (*g*). The common rule, that transfers cannot be made till all previous calls are paid, is pleadable only by the company, and cannot be used as a defence against calls by the transferree who

(*a*) *Birkenhead Ra. Co.*, 6 Ra. Ca. 211.

(*b*) See the English cases, *Jacques* v. *Chambers*, 4 Ra. Ca. 205; *Oakes*, 9 Hare 666; *Tanner*, 11 Beav. 69.

(*c*) *Waterford Ra. Co.*, 14 Q. B. 672.

(*d*) *Banwers Iron Co.*, 8 C. B. 406.

(*e*) See *Deposit Life Assur. Co.*, 6 E. and B. 761.

(*f*) *Dublin and Wicklow Ra. Co.*, 8 Ex. 181; *Newry Ra. Co.*, 5 Ex. 565; *North-Western Ra. Co.* v. *MacMichael*, 1850, 5 Exch. 114.

(*g*) *Bargate*, 5 House of Lords Cases 297; *Bosanquet*, 4 Ex. 699; *Taylor, Jones and La Touche*, 2 Ir. Re. 24.

has been registered (*a*). When this rule exists, the seller remains liable for all calls made before the company chooses to register the purchaser (*b*). When shares are transferred and registered, after a call has been made, but before it is payable, it seems doubtful whether the company can enforce the call against either transferrer or transferree (*c*). It is no defence to an action for calls, that, according to statements made by directors, more than the subscribed capital will be necessary to complete the undertaking (*d*), or that the funds are being misapplied (*e*), or that a railway company has failed to complete a part of the line (*f*), or that the scheme of a railway as authorized by the special act is different from that contained in the subscription contract (*g*). Yet it is a good plea in defence, that the call was not made by persons duly authorized (*h*); and that it was made before the whole of the capital had been subscribed, where the special act provided that until this was done, the provision and powers of the act should not come into force (*i*). But it has been held, that when there is no provision of this kind in the special act, the plea cannot be taken on sec. 16 of the English Lands Clauses Act, which, though it requires the whole capital to be subscribed before the compulsory powers can be exercised, does not prevent calls from being made before that has taken place (*k*).

(*a*) *Howden* v. *Kennedy*, 1855, 18 D. 246.

(*b*) *Humble* v. *Langston*, 7 M. and W. 517; *London Ra. Co.*, 2 Ma. and Gr. 674.

(*c*) *North Am. Co. Association*, 15 Jur. 187; *Watson* v. *Eales*, 23 Beav. 294; *Aylesbury Ra. Co.*, 4 Ma. and Gr. 651, and 2 Ra. Ca. 668.

(*d*) *Edinr. and Newha. Ra. Co.*, 1842, 4 D. 1459.

(*e*) *Nat. Ex. Co.*, 1849, 11 D. 571.

(*f*) *Newry Ra. Co.*, 1850, 13 D. 284.

(*g*) *Fife and Kinross Ra. Co.*, 1861, 23 D. 891.

(*h*) *Swansea Dock Co.*, 20 Law J. Ex. 447. See p. 155.

(*i*) *Norwich and Lowest. Nav. Co.*, 1 Moo. and Mal. 151.

(*k*) *Waterford and Dublin Ra. Co.*, 6 Ra. Ca. 753. The corresponding provision in the Scotch Act is sec. 15.

CHAPTER VII.

COMPANY OR PARTNERSHIP PROPERTY.

What it means.

UNDER this expression is included whatever is immediately liable for the debts and obligations of the company; and this may consist either of what was originally contributed to the common stock, or of what has *stante societate* been added thereto.

Partnership property held in trust.

As, according to the law of Scotland, a partnership or unincorporated company is only a *quasi* person, and not a proper person, like an individual or a corporation, it should seem that it cannot hold property directly, any more than it can sue or be sued like a proper person. Whatever, therefore, by express contract, or by operation of law, becomes the property of the company, must be taken as held in trust for the uses and purposes of the company. Heritable property is held in the names of one or more of the partners, or in those of third persons as trustees chosen for that purpose; moveables or personalty appear to be held by all the parties jointly or *pro indiviso*, as trustees for the concern.

As regards the mode in which moveables are held, there no doubt hangs a good deal of confusion, or rather obscurity, about the *dicta* of our institutional writers; some loose expressions even appearing to indicate that personalty might be held directly by unincorporated companies. It is believed, however, that the theory here given is the only correct exponent of our law (*a*).

CONVEYANCE AND VESTING OF COMPANY PROPERTY.

Partnership contract operates as a conveyance.

The partnership contract operates as a direct conveyance of whatever is or has been undertaken to be contributed by a partner.

(*a*) Bell's Princip. sec. 353; Shaw's Bell's Comm. 214; Stair i. 16. 1.

But it operates as a conveyance merely, and does not supersede the necessity of such modes of transference as are required by law (*a*).

Personalty.

Moveable property, conveyed under the partnership contract, or by subsequent agreement, and already in possession of a partner at the date of the conveyance, requires no delivery to complete the transference to the company, because no delivery is possible, every partner being *præpositus negotiis* for the company, and the company as a fictitious person acting only through its agents (*b*).

Delivery and notice.

But where commodities in the hands of third parties are conveyed by the owner as part of his contribution to the stock of the company, in order to ascertain whether delivery is necessary, it must first be considered in what character they are held by their possessors. If they are held by the latter merely as agents for the contributing partner, their delivery is not necessary, as possession by the agent is possession by the principal. If, on the other hand, having been purchased by the contributing partner, they still remain in the custody of the seller, delivery will be required (*c*). And this may be made to any one of the partners, or to a servant at the company's place of business. In order to prevent attachment of the contributed articles by the private creditors of the partner, intimation should, in the case under consideration, be at once made by the company to the seller, that the property had passed to the company, and that he must now make delivery to it (*d*). When a partner contributes liquid or illiquid claims which he holds against third parties (choses in action), the conveyance must be completed by intimation in the usual way.

Ships.

Ships are transferred in terms of the Registration Acts.

Realty. Feudal rights.

Feudal property is held for companies by the intervention of trustees, who may be either one or more of the partners or third persons chosen for that purpose (*e*). It has been held that a disposition to one partner *nominatim* and to the other members of the company was good, and that seisin and confirmation following thereon effectually vested the lands in the partners *pro indiviso* for the company (*f*). This is not, however, a precedent to be followed in modern conveyancing.

(*a*) Stair i. 16, 1.
(*b*) Sh. Bell's Com. 216.
(*c*) Sh. Bell's Com. 216.
(*d*) 19 and 20 Vict. c. 60, s. 2.
(*e*) Menzies' Lect. 46.
(*f*) *Dennistoun, MacNair, and Co.*,

When feudal property previously belonging to a partner is contributed as part of the stock, the partnership contract will convey the *jus ad rem*, or, in other words, will operate as a general disposition; but to exclude the diligence of the private creditors of the contributing partner, he must execute a disposition, or its equivalent, of the property in favour of the partners, or of some other person, in trust for the company; or else the company must bring a declarator and adjudication in implement with similar conclusions, and the title must in all cases be completed by registration in common form (*a*). The same rules apply as to acquisition of feudal property made, *stante societate*, for the company in name of a partner.

Leasehold.

In like manner, the right to leasehold property ought to be taken to all the partners *nominatim*, or to some other persons as trustees for the company (*b*). It is sometimes indeed loosely said that a lease may be held by an unincorporated association; but if by this is meant that the *quasi* person of such an association can hold leasehold property, the proposition seems to be without foundation, and to be subversive of the distinction between mere partnerships and proper corporations. In the only case that might seem to countenance this view (*c*), the Court merely gave effect to a lease granted to a company *socio nomine*, for the same reason apparently that a title to sue *socio nomine* is sustained. It will be observed, however, that no countenance is given to the notion that unincorporated associations can hold leases in their descriptive names; and it is worthy of consideration how far this decision can in the present day be held of authority, when it is remembered that leases of a certain endurance may be entered on the register of sasines, thereby giving them even greater facilities for transmission and mortgage than belong to proper feudal rights.

Leasehold forming part of contribution.

When leasehold property forms part of what a partner undertakes to contribute, the partnership contract would seem to operate as an assignation to the whole partners, jointly and severally, for behoof of the concern, provided the lease contains a power to assign.

1808, M. App. Tack 15; compare with *Morison* v. *Miller*, 1818, Hume 720.

(*a*) Shaw's Bell's Com. 216.

(*b*) Bell on Leases i. 149; *Murray* v. *Hogarth and Co.*, 1835, 13 S. 453.

(*c*) *Dennistoun, M'Nair, and Co.* v. *Macfarlane*, 1808, M. App. Tack 15. See 1 Hunter on Landlord and Tenant, 205.

But possession by the company is still necessary to complete the transfer, and to render the right secure against a second assignee, or an adjudging creditor of the partner (*a*). When the lease is unassignable, the partnership contract would perhaps be considered as converting the tenant into a trustee for the company (*b*).

Practical rules.

To exclude, however, all risk on the part of the company, it is most prudent in such cases to obtain, when practicable, either a new lease from the landlord, or a sub-lease from the tenant, in favour of some one or more of the partners, or of strangers as trustees for the company (*c*). Adjudication may sometimes be found necessary as a means of making good the company's right to a lease contributed by a partner.

Registration of lease.

When the lease has been registered, in terms of the late Act (*d*), a notarial instrument in the form of Schedule C, appended to the statute, and setting forth the conveyance under the company contract, will, when registered, effectually complete the transference.

Termination of lease.

A lease granted for behoof of a company, but excluding assignees, expires on dissolution of the company, and can form no part of the separate estate of any of the partners (*e*).

COMPANY PROPERTY AS DISTINGUISHED FROM SEPARATE ESTATE.

Distinction between company property and separate estate.

Company property must be carefully distinguished from the separate estate of the individual partners. It is no doubt true that every member of an association which has not attained limited liability, is liable for company debts to his last shilling and his last acre; yet the mere fact of his membership does not operate as a conveyance of any part of his separate estate which he has not agreed to contribute, so as to amalgamate it with the company property, to the effect of destroying his own rights as proprietor, and of liberating it from the diligence of his creditors. Company property is held in trust for the company, and is directly attachable by its creditors; separate estate remains the absolute property of the part-

(*a*) Bell on Leases.
(*b*) See *M'Vean*, 1864, 2 M'Ph. 1150.
(*c*) See *Borrows* v. *Colquhoun*, 1852, 14 D. 791; reversed 1854, 1 Macq. 691.
(*d*) 20 and 21 Vict. c. 26.
(*e*) *Campbell* v. *Calder Iron Co.*, 11 Dec. 1805, 1 Bell on Leases 150, and 1 Bell's Com. 82.

ners, and becomes liable to be made available for company debts, by reason of its owners being guarantees or sureties for the company.

Distinction exists even in private firms.

The distinction between company property and separate estate is very broadly marked in proper joint-stock companies; but it also exists in all private partnerships, the nature of whose business requires the possession of common property.

English law.

In England the same distinction prevails; and as the law has been very much elaborated in that system on this branch of the subject, it may often be referred to with great advantage. At first sight it might be supposed, that as the English law ignores the separate person of the firm, its authority on this matter would not be a trustworthy guide. But, in truth, this difference in principle between the two systems—which in some other branches of partnership law creates a wide divergence — produces here nothing beyond an evanescent distinction in the terms employed. In this country we consider company property to be held for *the company;* in England it is regarded as held for all the *partners as such.* And whichever view be adopted, the practical result will generally be found to be the same. Even as regards the nomenclature, though 'joint-estate,' 'joint-stock,' and the like, are the proper English equivalents for the Scotch expressions 'company' or 'partnership property,' yet in both systems these phrases are used indiscriminately.

Best mode of keeping the two kinds of property apart.

To exclude questions as to what is company property and what is separate estate, all partnership articles, deeds of settlement, articles of association, or other instruments containing the company contract, should distinctly specify what is contributed to the common stock by the several partners at the commencement of the association; and a record should be kept and duly authenticated of all acquisitions subsequently made on behalf of the company from time to time. Whenever also a formal transfer becomes necessary, this should be completed without delay. Such precautionary measures, though they may avail little in questions with creditors, will be found of great use to determine any disputes that may arise among the partners themselves when the concern is dissolved (*a*).

(*a*) *Minto* v. *Kirkpatrick*, 23 May 1833, 11 S. 632; *Ewing* v. *Chrichton*, 1827, 4 Mur. 184.

When these or similar measures have not been adopted, it often becomes extremely difficult to determine what is company property and what is separate estate: and no absolute rule can be laid down for the decision of such questions, for they fall to be determined by reference to the whole circumstances of each individual case. The following general principles may, however, be found useful as practical guides:— General rules.

1. When the question as to what is company property and what is separate estate arises between the partners themselves, inquiry should first be made into what was arranged at the formation of the concern, and what arrangements, if any, were subsequently agreed upon during the continuance of the partnership.

2. When no definite arrangements can be established, or when the question arises between the company and strangers, inquiry should be directed to the following points: For what purpose the property in dispute was acquired; what use was made of it; whence it came; and by whose money it was purchased (*a*).

We shall now examine the practical application of these principles somewhat in detail.

As every partner is the implied agent of the company, it is a general rule that personal property acquired by him in name of the company becomes *ipso facto* company property, even though it should have been paid for by the partner with his own money (*b*). If, however, a partner, within sixty days of his bankruptcy, were to resort to a transaction of this kind with the view of defeating the claims of his creditors, or of conferring a preference on the company, it would, it is thought, be challengeable at the instance of any one having interest. Property got in company name.

E converso, property acquired by a partner in his own name, will be presumed to have been acquired for the company, if it has been paid for out of the company funds (*c*). This, however, is only a presumption in law, though a strong one, and it may accordingly be rebutted by counter evidence; as, *e.g.*, if it can be shown Property got in partner's name.

(*a*) See *Allan* v. *Allan's Trs.*, 1837, 15 S. 1058; *Bruce* v. *Ogilvie*, 1813, 1 Dow 38, and 5 Paton's App. 706.

(*b*) *Wallace and Co.* v. *Campbell*, 1821, 1 S. 56; 1824, House of Lords, 2 Sh. App. 467.

(*c*) Ersk. iii. 3, 20; *Wallace and Co.*, *supra*; *Smith*, 5 Vesey 193; *Robley* v. *Brooke*, 7 Bli. 90; *Morris* v. *Barrett*, 3 Y. and J. 384; *Forster* v. *Hale*, 5 Ves. 308; *ex parte Connell*, 3 Deac. 201; *ex parte Hinds*, 3 De G. and S. 613.

that the price was advanced by the company in loan, or in satisfaction of a debt due by it to the partner (*a*).

Beneficial acquisitions.

Even property acquired by a partner in his own name, and with his own means, if it be a beneficial acquisition for the company, and in its line of business, will be held to have been acquired for, and may be claimed by, the company (*b*).

Vesting.

When, however, the acquisition is made in name of the individual partner, and not in that of the company, the property does not *ipso facto* vest in the company, or in the whole partners jointly as trustees for the concern, but in the purchasing partner, who holds it in trust for the company. If, therefore, the partner sells the acquisition before the company has made good its claim, the purchaser is safe from challenge, and the company has only a claim of damage against the partner for his malversation (*c*).

Questions *inter socios*.

In a question *inter socios*, it does not seem to make any difference whether the right acquired be personal or real, or even feudal, and the purchasing partner have been duly seised therein. If it be a right in the company's line of business, and plainly beneficial for the concern, it may be claimed by the company (*d*).

Property in ships.

An exception to the principles here laid down has hitherto obtained in the case of property in ships. From peculiarities in the Ship Registration Acts, it has been uniformly held, both in this country and in England, that unless the vessels appear in the register as company property, it is incompetent to prove them to be so, even though it could be shown that they were useful in the company's line of trade, had been bought with its money, and had even been used as company property (*e*). How far the provisions of the present Shipping Act, 17 and 18 Vict. c. 104, may allow other principles to come into play, has not yet been determined.

English rule as to connection with firm.

It is held in England, that whatever property a partner may acquire in consequence of his connection with the firm, and which, but for his want of good faith, would have been acquired for the

(*a*) *Smith* v. *Smith*, 5 Ves. 193.

(*b*) *Inglis* v. *Austine*, 1624, M. 14562; Ersk. iii. 3, 20; *Campbell* v. *Calder Iron Co.*, 11 Dec. 1805, 1 Bell's Com. 82, n. 3; 1 Hunter on Land. and Ten. 207.

(*c*) Ersk. iii. 3, 20.

(*d*) *Minto* v. *Kirkpatrick*, 1833, 11 S. 632.

(*e*) *Macarthur* v. *M'Brair*, 1844, 6 D. 1174; *Ord* v. *Barton*, 1846, 8 D. 1011; *Curtis* v. *Perry*, 6 Ves. 739; *ex parte Houghton*, 17 Ves. 251.

firm, must be treated in equity as company property (*a*). It would appear, however, that if the acquisition is unconnected with the company's line of business, or that, if so connected, it has been conceded to him by third parties for his own benefit solely, he will be allowed to retain it as separate estate (*b*).

No case exactly raising these questions appears to have occurred in Scotland; but there can be little doubt that the principles above stated would be given effect to by our tribunals, as they arise out of the very nature of the partnership contract, and are in close analogy with other principles that have been acted upon in our system (*c*).

Acquisitions after dissolution.

If, after dissolution, but before winding up, a partner continues to carry on the business of the concern, and acquires property thereby, such property does not, in the absence of fraud, fall under the partnership estate (*d*). And even where profits were realized from the use of what was undoubtedly partnership property, they were not, in the circumstances supposed, held to belong to the company assets (*e*). The case would be different if the surviving or continuing partner, and the representatives of his late partners, stood to each other in the relation of trustee and beneficiaries (*f*).

Use of property by firm.

It must be observed, however, that while the fact of any kind of property having been used for partnership purposes is a strong presumption in favour of its being company estate, this is by no means conclusive evidence of such a proposition. The property may in truth belong to one of the partners, who may only have given the use of it to the company during the continuance of the partnership, or for a specific period. In other words, the partner may have contributed the use or proceeds of the property, not the property itself. This is a case of daily occurrence (*g*).

(*a*) *Featherstonehaugh*, 17 Ves. 298; *Clements* v. *Hall*, 2 De G. and J. 173.

(*b*) *Campbell* v. *Mullet*, 2 Swanston 551.

(*c*) See Ersk. iii. 3, 20; *Campbell* v. *Calder*, 1805, 1 Bell's Com. 82, n. 3; *Gibson* v. *Stewart*, 1835, 14 S. 166, 1 Rob. App. 260. See also chap. on Powers of Partners, and Pothier de Soc. N. 123.

(*d*) *Minto* v. *Kirkpatrick*, 1833, 11 S. 632.

(*e*) Same case. See Lindley 549.

(*f*) *Cochrane* v. *Black*, 1855, 17 D. 321.

(*g*) *Cox* v. *Stead*, 1833, 11 S. 672, aff. 1834, 7 W. and S. 497; *Smith* v. *Watson*, 2 B. and C. 401, and 3 Ross Lead. Ca. 442; *Meyer* v. *Sharp*, 5 Taunt. 74; *ex parte Hamper*, 17 Ves. 404; *Wedderburn's* case, 4 My. and Cr. 41; compare with *Reid* and *Hollingshed*, 4 B. and C. 867. See *Sime* v. *Balfour*, 1804, M. App. Her. and Mov. 3; House of Lords, 1811, 5 Pat. 525.

Separate estate vested *pro indiviso.*

Further, property may be vested in the individual partners *pro indiviso*, and yet such property may be separate and not company estate. The following case is a good illustration of the principle here stated.

Wilson v. *Threshie.*

Two partners of a fishcuring concern were *pro indiviso* proprietors of the buildings in which it was carried on. On the bankruptcy of one of them, his trustee claimed half of the house property as the separate estate of the bankrupt. In an action of declarator at the instance of the other partner, to have it found that the whole was company property, it came out in evidence, that there had been originally another partner, who had retired from the firm; that this partner had made the offer for the property for behoof of the company, and had then stated that he intended to retire; and that the property had been fitted up and used for the purposes of the company. But, on the other hand, it was proved that the partners were not bound to each other for any specific period; that though the partner who retired had remained in the concern for a year after the property was acquired, yet that the titles were taken to the other two partners *pro indiviso*, and to their heirs and assignees, without mention of him; and that the partner who now contended for its being company property had taken infeftment *pro indiviso*, and had granted a heritable security over it for his own private debt. Upon the whole, it was held to be separate estate (*a*).

In this and similar cases, the property is held by the partners not as partners, but as joint-owners; and what they contribute to the partnership is not the joint-property, but its use and proceeds. For illustration of the working of this principle, reference may be made with advantage to the English cases noticed below (*b*).

Campbell v. *Calder.*

It must be observed, however, that when property has been plainly acquired for company purposes, and has been used without objection as such, the mere fact that it stands in the name of one of the partners will not render it separate estate. Thus, in *Campbell* v. *Calder Iron Company* (*c*), a lease was entered into with David

(*a*) *Wilson* v. *Threshie*, 1826, 4 S. 366. See also *Jeffrey* v. *Crightons*, 1821, 1 S. 137; *M'Vean* v. *M'Vean*, 1864, 2 M'Ph. 1150.

(*b*) *Brown* v. *Oakshott*, 24 Beav. 254; *Morris* v. *Barret*, 3 Y. and J. 384; *Jackson*, 9 Ves. 591.

(*c*) 1805, 1 Bell on Leas. 150, 1 Bell's Com. 82.

Mushet, of the Calder Ironworks, for himself and partners; but the lease was granted to 'David Mushet and his heirs, secluding assignees, legal or voluntary, and all sub-tenants.' On the bankruptcy of the company, the Court found that the lease had determined, though Mushet himself was not bankrupt, on the ground that it was truly granted to the company, and not to Mushet as a private individual.

CONVERSION OF COMPANY PROPERTY INTO SEPARATE ESTATE.

Whenever, at the formation of a company, the partners make contributions of property to the concern, they convert their separate estate *pro tanto* into company property; and when, at its dissolution, they divide the common stock among themselves, or each receives back his original contribution, they change company property into separate estate.

The same conversion takes place when one partner retires from the concern, and receives a part of the company property; when the company transfers to one of its partners, by sale or otherwise, what previously formed part of the joint-property; when a partner throws into the common stock of an existing company that which was previously his own; and when a new partner is introduced and contributes property.

It is competent both to the partners and to the company to make such conversions at will, so long as they retain the full control of their respective estates. The agreement or obligation to make such conversion may be proved *prout de jure*, except in the case of heritable property, where written evidence is required. The actual transfer, however, which completes the conversion, must, as we have already seen, take place in accordance with such solemnities as the law requires.

English law.

In England, this free power of conversion is restrained in the few cases only where creditors have a lien over the property; but in this country it ceases whenever the estate sought to be converted is laid under restraining diligence. And a partner endeavouring to convert his separate estate into partnership property, in fraud of his creditors, would come under the provisions of the Act 1621, c. 18, as the company would be regarded as a conjunct and confident person. At least this would be the case in private partnerships.

See, as examples of the conversion of company property into separate estate, the cases noted below (*a*).

NATURE OF PARTNERSHIP PROPERTY.

The partnership property, or joint-stock, is, as we have already seen, held by all the partners jointly for the uses of the company; and one of the consequences of this is, that all heritable property belonging to the company is moveable *quoad* succession, for the only right in it which any partner possesses is a mere *jus crediti*. This rule is firmly fixed both in the English and Scottish systems of law (*b*).

In applying this rule, however, great care must be taken to distinguish between company property and separate estate. To the former only is the rule applicable.

After what has been already stated as to the distinction between company property and separate estate, it is unnecessary to do more in considering this part of the subject than to state the following rules:—

General rules.

1. Property, in its nature heritable, will be deemed moveable, and descend to the executors of partners, when it was acquired simply for partnership purposes, was intended to be thrown into the common stock in its entirety, and not merely for its temporary use, or was purchased with company funds, though for a temporary purpose only (*c*).

2. Property, in its nature heritable, is considered unconverted realty, and descends to the heirs of partners, if it has been acquired as separate estate by a partner, or by two or more of them as co-owners, and its usufruct only has been contributed for company purposes (*d*).

(*a*) *Bayne* v. *Ferguson*, 1817, 5 Dow 151; *Cunningham* v. *Warner*, 1824, 2 S. App. 225; *M'Cowan*, 1852, 14 D. 901.

(*b*) 2 Bell's Com. 613; Lindley 565.

(*c*) Compare *Sim* v. *Balfour and Others*, 1804, M. App. *voce* Her. and Mov. No. 3, H. of L. 1811, 5 Pat. App. 525; *Corse's* case, 1802, 13 F. C. 162, M. App. *v.* Her. and Mov. No. 2; *Murray* v. *Murray*, 1805, *ibid.* No. 4; *Minto* v. *Kirkpatrick*, 1833, 11 S. 632; *Irvine* v. *Irvine*, 1851, 13 D. 1367. The following English cases may also be referred to: *Bell* v. *Phyn*, 7 Ves. 453; *Randall*, 7 Sim. 271; *Cookson*, 8 Sim. 529; *Ripley* v. *Waterworth*, 7 Ves. 425; *Darby*, 3 Drew 495; and *Essex*, 20 Beav. 442.

(*d*) Compare the Scotch cases noted *supra*, with the English cases, *Balmain* v. *Shore*, 9 Ves. 500; *Rowley* v. *Adams*, 7 Beav. 548; and *Phillips*, Bisset on Partnership, p. 50.

PROPERTY HELD BY CORPORATIONS.

Corporations may hold property directly.

Corporations, being proper persons, are entitled to hold property, whether heritable or moveable, real or personal, directly; and do not require the intervention either of their members or of other persons as trustees for their behoof. The titles to heritable property may therefore be taken to the corporation in its corporate name, and the feudal right may be perfected by sasine or registration in like manner (*a*).

Trustees sometimes necessary.

Yet, inasmuch as corporations never die, being possessed of endless endurance, the casualty of relief due at the entry of an heir can never arise, where the vassal is an artificial person of this kind. It has accordingly been fixed by a tract of decisions, that superiors cannot be compelled to give an entry to a corporation unless they have become bound to do so by special stipulation or compromise. And this holds good even in the case of adjudications (*b*). To obviate this difficulty, it has accordingly become common to adopt a device originally suggested by Lord Stair (*c*), and to take the title in trust for the corporation to some person and his heirs, upon whose death or neglect to enter, the superior's casualties may arise and become exigible. This device has no doubt the merit of silencing the objections of superiors, but it is open to all the disadvantages usually found to be inseparable from the complicated machinery of continuous trusts, and it should therefore never be resorted to when any arrangement can be made with the superior by which an entry can be obtained for the corporation direct. Nor, in general, need any great difficulty be apprehended in bringing about such an arrangement. A sum of money sufficiently large to be an equivalent for the casualties may be agreed upon and paid at the outset, or else the superior may be got to accept of an agreed-upon sum at the expiration of certain fixed terms of years in lieu of the legal claims, whose periods of payment depend on the uncertain duration of human life.

Disadvantages of this practice.

(*a*) Shaw's Bell's Princ. s. 2178.

(*b*) 2 Stair 3, s. 41; 2 Ersk. 7, s. 7; *Hamilton*, as reversed, 1713, Rob. App. 172; 2 Bell's Ill. 36; *Hill* v. *Merchant Company of Edin.*, 1815, 18 F. C. 132; *Sir H. Campbell*, 1843, 5 D. 1273; *Gardner*, 1845, 7 D. 286; *Learmonth*, 1854, 16 D. 580. See *Earl of Mansfield*, 1829, 7 S. 642.

(*c*) 2 Stair 3, s. 41.

Often unnecessary

There is great reason, however, to believe that conveyancers, from being in the habit of preparing titles to land for unincorporated associations, which can only hold real property through the intervention of trustees, frequently adopt the same method in the case of proper corporations, and take the titles not to the corporation itself in its proper name, but to its existing officials and their successors in office in trust for its behoof, even where such a course is neither prescribed in the incorporating instrument nor necessitated by the objections of the superior (*a*). Such a practice ought never to be adopted when it can be avoided: it is not only complex and cumbrous in itself, but may, in some cases, give rise to questions seriously affecting the validity of the title.

Statutory forms. Act 1845.

In the case of companies incorporated by Act of Parliament for carrying out public undertakings, the proper procedure and forms for completing the company's title to land and other heritage will be found in the 'Lands Clauses Consolidation (Scotland) Act' (*b*), or in that taken in connection with the special act incorporating the company. These provisions will be fully considered at a future stage of the treatise. In the meantime it may be remarked, that the statutory forms and mode of procedure should in all cases where practicable be rigidly adhered to; for, though trifling deviations may not be productive of serious consequences, nothing short of necessity can warrant the conveyancer in deviating from prescribed statutory forms. All such additions, amplifications, or repetitions as are sometimes introduced *in majorem cautelam*, after the fashion of the ordinary styles, are at least censurable as unmeaning superfluities, and may subsequently produce effects or minister questions that cannot be foreseen. The maxim '*superflua non nocent*' is a very dangerous guide in such cases.

Act 1862.

Companies formed under the 'Companies Act, 1862,' are entitled like proper corporations to hold lands in the corporate name (sec. 18); and it is further provided, that all property, real and personal, belonging to a company previously existing, but afterwards registered under the Act, pass to and vest in the company as a corporation as soon as registration takes place (sec. 193). Of

(*a*) *Sir H. Campbell*, 1843, 5 D. 1273.
(*b*) 8 Vict. c. 19 (1845).

course this does not affect the mode, tenure, or the form, as by trustees, etc., in which the lands may have previously been held.

Limitations as to amount of land.

The amount of land which may be held by incorporated companies is often specified in the charter or special act. This is always the case with companies formed under the Companies Clauses Act, 1845. The Act of 1862 makes no restriction of this kind in regard to companies formed for mercantile gain; but it provides that no company formed under the Act for the purpose of promoting art, science, religion, charity, or other such objects not involving the acquisition of gain, shall, without the sanction of the Board of Trade, hold more than two acres of land (sec. 21).

CHAPTER VIII.

DUTIES OF PARTNERS TOWARDS THE COMPANY AND EACH OTHER.

Exuberant trust in partnership.

PARTNERSHIP is a contract of exuberant trust (*a*), and therefore the law expects and requires that the conduct of the partners towards each other shall be characterized by the most scrupulous good faith, that they shall zealously act and co-operate for the common good, and that they shall not place their individual interests before those of the company.

No claim beyond share of profits.

In conformity with these principles, it is settled law that a partner can make no claim beyond his share of profit, whether in the name of salary, commission, or otherwise, on account of his trouble in conducting the partnership business, or for his services in behalf of the company; for, however eminent or indispensable these may have been, they are no more than what it was his duty as a partner to do (*b*). Nor in the absence of special stipulation does it make any difference that the claimant was put to an unusual amount of personal trouble or inconvenience on account of a *casus improvisus* (*c*), or that he was a managing partner (*d*), or that the services were of a purely professional kind (*e*). The same principles have been given effect to in England (*f*). But these rules do not apply where services have been rendered in carrying on the business of the firm after its dissolution (*g*); for such services are then no longer prestable *ex con-*

(*a*) In societatis contractibus fides exuberat, Cod. iv. t. 3, l. 7, 3.

(*b*) *Brock* v. *Brown*, Dec. 9, 1696, M. 14563; *Macwhirter* v. *Guthrie*, 14 Feb. 1822, 1 S. 295, and 26 Jan. 1821, Hume 760. See also *Gibson* v. *Stewart*, 16 Dec. 1835, 14 S. 166, 1 Rob. 260.

(*c*) *Campbell* v. *Beath*, 3 May 1826, as reversed in House of Lords, 2 W. and S. 25.

(*d*) See *Hamilton* v. *Geddes*, 1805, 4 Pat. App. 657.

(*e*) *Duncan* v. *Union Canal Co.*, 8 Feb. 1831, 9 S. 398. See also *Hunter* v. *Cochrane's Trs.*, 18 Feb. 1831, 9 S. 477.

(*f*) *Hutcheson* v. *Smith*, 5 Irish Eq. 117; *Whitle* v. *Macfarlane*, 1 Knapp 311; *Bentley* v. *Craven*, 18 Beav. 75.

(*g*) *Berry* v. *Lamb*, 7 July 1832, 10

tractu of the partnership, and may therefore be charged for. When, however, a surviving partner carried on the concern as executor of his deceased partner, he was held in England entitled to no remuneration, as he did no more than was his duty as executor (*a*).

This may be changed by stipulation.

It is always competent to stipulate that a partner shall be entitled to remuneration over and above his share of profits; and such stipulation, when proved, will be effectual (*b*).

Partners cannot stipulate for private advantage.

Another consequence of the exuberant trust inseparable from the contract of partnership may be stated as follows:—Partners, in dealing with strangers, cannot stipulate for any private advantage at the expense of the company, which shall be available to them in a question with the company. Whatever a partner acquires with the company funds he is bound to communicate to the company, though the acquisition has been made in his own name; and even when he purchases with his own money and in his own name, a right which is in the company's line of trade, or would be for it a beneficial acquisition, he will be held to purchase, not for himself, but for the company (*c*). In such cases, however, the company merely acquires a *jus ad rem* (*d*), the *jus in re* remaining with the partner who made the purchase in his own name; or, as it is expressed in England, the purchasing partner being held to be a trustee for the benefit of the copartnery (*e*). The rules here referred to have been repeatedly enforced and illustrated in England. Thus, in the well-known case of *Featherstonehaugh* v. *Fenwick* (*f*), two partners who had obtained in their own names a lease of the partnership premises, dissolved the copartnery, and sought to exclude their copartners from all interest in the new lease. They were, however, found to be merely trustees of the lease for behoof of the firm (*g*).

S. 792; *Featherstonehaugh* v. *Turner*, 25 Beav. 382; *Brown* v. *De Tastet*, Jac. 284; *Crawshay* v. *Collins*, 2 Russ. 347, 3 Ross Le. Ca. 622.

(*a*) *Burden* v. *Burden*, 1 V. and B. 172. See also *Stocken* v. *Dawson*, 6 Beav. 371.

(*b*) *Macwhirter* v. *Guthrie*, 1822, 1 S. 295, Hume 760; *Berry* v. *Lamb*, 7 July 1832, 10 S. 792. See *per* Wigram, V.-C., in *Webster* v. *Bray*, 7 Ha. 179; *Geddes* v. *Hamilton* (*Glasgow Glass Work Co.*), 1801, aff. 1805, 4 Pat. App. 657.

(*c*) Ersk. iii. 3, 20; *Inglis* v. *Austine and Others*, 26 March 1624, M. 14562. 2 Bell's Com. 614.

(*d*) Ersk. *ut supra*.

(*e*) See Sir Wil. Grant's (M.R.) statement in *Featherstonehaugh* v. *Fenwick*. See Dig. xvii. t. 2.

(*f*) *Featherstonehaugh* v. *Fenwick*, 17 Ves. 298.

(*g*) See also *Alder* v. *Fouracre*, 3

Application of rule in England.

In England, the maxim, *in societatis contractibus fides exuberat*, has received a still more extensive application, and has given birth to the following rule: that a partner shall not be allowed to derive profit from any dealings between himself and the partnership, unless such right have been conceded to him by agreement. Thus it has been held that a partner, who deals in a certain commodity, and supplies therewith the firm of which he is a member, cannot make the ordinary profit of his trade thereon, but must supply it at wholesale price, or at the price at which he obtained it (*a*). It seems also to be an established rule, that a partner cannot carry on for his own benefit any business which would compete with that of the firm of which he is a member (*b*).

Questionable if this be law in Scotland.

It is very doubtful how far these rules, as applied to the members of private partnerships—not to directors in public companies—can be taken to be in accordance with the law of Scotland. A partnership in Scotland possesses, as we have already seen, a *quasi persona* distinct from the individuals of which it is composed; and they accordingly may, like third parties, stand to it in the relations of debtors and creditors. It is difficult, therefore, to see why they should not be able to act and transact with it on the same footing as strangers, and why contracts entered into with them should not be equally binding. It may be said that they stand to each other or the company in the relation of trustees, and therefore cannot make profit by their mutual transactions. But it must be observed that they are trustees only *quoad* the funds which the society *de facto* possesses, not as regards such as it may be desirable for it to possess, but which it does not yet possess. It does not therefore appear that there is any good reason to hold that, according to the law of Scotland, a partner may not supply the company with an article of which it stands in need, on the same terms of advantage to himself as if he were dealing with strangers.

In like manner, it appears foreign to the genius of our law to maintain that a man, by becoming the partner of a firm, must be held to have incapacitated himself from carrying on any business that might be in rivalry with the business of the firm. The firm

Swa. 489; *Clegg* v. *Fishwick*, 1 M. and G. 294; *Clements* v. *Hall*, 24 Beav. 333.

(*a*) *Bentley* v. *Craven*, 18 Beav. 75.

(*b*) *Lock* v. *Lynane*, 4 Irish Ch. 188; *Glassington* v. *Thwaites*, 1 Sim. and St. 124; *England* v. *Curling*, 8 Beav. 129.

and he are separate persons; and if a principle such as this were once assented to, it would seem to follow that a man could not at one and the same time be a member of two separate companies in the same line of business,—a doctrine that has never received the sanction of the courts either here or in England.

Of course the case is very different where a partner has, in his transactions or contracts with the company, been guilty of fraudulent misrepresentation or concealment, or where, taking advantage of his connection with the company, he has fraudulently secured advantages for a rival concern carried on conjunctly with others or started on his own account. In such cases the transaction cannot stand; not in respect of the partnership relation, but because it is vitiated by the element of fraud.

Partners cannot use company property for their own purposes;

It is also a consequence of the exuberant trust reposed in partners, in virtue of which they are regarded as trustees of the partnership property for the benefit and uses of the partnership, that they cannot employ that property for their own private advantage. Thus in England it was held, that where the master of a vessel, who was part owner of her with others, traded with her on his own account, and made considerable profits, he was bound to account to his co-owners for their share of such profits (*a*).

nor the company connection.

In like manner, it would appear that a partner cannot render the influence or connection which he acquires by being a member of the firm, a means of securing for himself advantages which he ought in honour to have obtained for the firm. This was decided in the English case of *Russel* v. *Austwick* (*b*); and if a similar question arose in Scotland, there is no reason to doubt that the equitable principle here mentioned would be given effect to.

Bound to give their best attention and skill.

It is a consequence of the trust reposed in partners by each other, that they are bound to give the best of their attention and skill to the management and furtherance of the company's affairs. But if, from defect of judgment, or want of sufficient skill or prudence, they fall into error in management, they are not liable in the consequences, provided they have managed the company's affairs as they do their own (*c*).

(*a*) *Gardner* v. *M'Cutcheon*, 4 Beav. 534. See also *Benson* v. *Heathorn*, 1 Y. and C. C. C. 326.

(*b*) 1 Sim. 52.

(*c*) Ersk. iii. 3, 21. See Dig. xvii. t. 2, l. 52, s. 2, and l. 72.

CHAPTER IX.

POWERS OF MAJORITIES.

Will of the society.

ACCORDING to the law of Scotland, when an association of individuals is formed for the purposes of mercantile gain, whether it takes the form of a private firm, a common law company, a *quasi* corporation, or a fully incorporated body politic, a fictitious person is brought into existence for the prosecution of a certain undertaking, business, or line of trade. To enable this fictitious person to attain the ends of its creation, it must necessarily be endued with the attributes of willing and acting within the sphere of its prescribed operation. During the term of its subsistence, therefore, it is this fictitious person, and not the units of which it is composed, that must be considered as willing and acting. To its resolutions the individual wills of its members must be regarded as surrendered or subordinated; and it is bound by their individual acts and deeds only in so far as these are in accordance with its volition, express or implied. The fact that it transacts with the public by the intervention of its partners or officials, does not in the least degree detract from the truth of this proposition. It is the principal of which they are the general or special agents; and its will is as separate and distinct from theirs as the will of a merchant is distinct from that of his clerks and assistants. They have no right to bind it beyond the limits of their agency: when they do so, they are liable in indemnity; and contracts made with them in the knowledge that they are exceeding their powers are mere nullities.

How it is to be ascertained.

The important question therefore at once presents itself, How is the will of a mercantile association to be ascertained?

Limited by the sphere of action.

In answering this question, the first consideration which arises is, that a mercantile association, as it is a fictitious person, cannot be conceived of as possessing any power of volition at all beyond

the purposes for the prosecution of which it was formed. Outside this sphere the members no longer cohere as an aggregation, but their individuality at once reappears. At the outset they agreed to be bound together for a definite purpose only; apart from this purpose, they were to remain free and independent of each other as before. Hence it follows, that in the instrument of formation, and in that alone, the purposes of the association and the limits of its sphere of action are to be found. That was the basis of the contract; that the matrix in which the person of the association was cast.

In the case of incorporated associations this principle comes out in bold relief. There, as public authority presided at the creation of the association, it has never been doubted that any alteration of the sphere of its action could only be made by the creation of a new corporation, which might or might not be required to take up the obligations of the old. But even in the case of unincorporated firms and companies, the same principle exists when the matter is properly examined into. Here, when a change in the purposes of association is made, it does not seem theoretically correct to say that the old company has been modified, but rather that a new fictitious person has been formed, which has taken up the rights and obligations of its predecessor (*a*).

Unlimited within that sphere.

But while it is thus evident, on the one hand, that the fictitious person of a mercantile association can only exercise powers of volition within the sphere of the purposes for which it was brought into existence, it seems equally clear, on the other, that within this sphere these powers of volition are limited only by the common law. It cannot be presumed that men will associate for the prosecution of an undertaking, and at the same time set obstacles in the way of its successful accomplishment. Limits of this kind may indeed be set by the promoters, or by the public authority by which incorporation is conferred; but if this be so, they must be very distinctly specified in the instrument of formation.

Finds expression by majorities.

A mercantile association having thus free volition within the sphere of its prescribed purpose, the next inquiry is, How is this volition manifested? The general answer is, by majorities. The reason of this is apparent from the consideration that no other method would give effect to the principle, that every member is

(*a*) See *Miller* v. *Thorburn*, 1861, 23 D. 359.

entitled at common law to have a voice in the administration and management,—a principle not only necessary to prevent abuses, but plainly deducible from the mere fact of voluntary association, since it cannot *in dubio* be supposed that men would agree to combined action on any other terms (*a*).

Majorities of different kinds.

It must be observed, however, that this principle may find expression in other modes than that of majorities computed by the mere number of individual members. It may within certain limits have regard to the value as well as to the number of votes; that is to say, it may look not only to the number of the individuals voting, but also to the value of the interest they respectively hold in the concern. Thus, in companies with a capital divided into shares, or formed into consolidated stock, majorities are generally computed by reference not merely to the individual members, but in a greater or less degree to the number of shares or the amount of stock of which they are respectively possessed.

Rule of majorities cannot be eliminated.

Private partnerships are sometimes formed with the express stipulation that some of the partners only shall be entitled to share in the active management; and it might be thought at first sight, that such cases formed exceptions to the rule we are now considering. This, however, would be a great mistake. Stipulations of this kind refer to the executive management, or to agency as regards the public only, and will not be interpreted so as to deprive any member of a voice in the internal administration, and thus to defeat the principle of government by majorities.

English and Scotch law.

The principles we have now been endeavouring to explain are by no means peculiar to the law of Scotland; but inasmuch as they arise out of the very nature of the partnership relation, they will be found permeating the English system quite as much as our own. In the law of England, as we shall afterwards see, they have been long since settled and elaborated into a distinct system when applied to corporations; and they have also been in substance applied to unincorporated associations, though, from the non-recognition of the *quasi* person of the firm, they cannot always be referred to any very consistent theory. In the law of Scotland, which recognises the *quasi* person of a firm as well as the proper person of a corpo-

(*a*) *Mason*, 1747, M. 1871; *Macnab*, 1803, M. Ap. App. 2; *Meiklejohn*, 1805, M. Ap. Burgh Pro. 17; aff. 1810, 5 Pat. App. 298.

ration, the principles in question receive full effect, and are capable of being expressed in all cases with more theoretical accuracy than in the English system.

The practical consequences of the principles under discussion may, it is thought, be summed up in the five following propositions, in examining which *seriatim* the authorities both in English and Scotch law will be brought under notice:— General rules.

1. Where the instrument of formation has not otherwise provided, the will of the majority is the will of the company in all matters within the sphere of its operations.

2. The will of the majority is not the will of the company to any effect beyond or in opposition to the purposes of its formation, and does not in such cases bind a dissenting minority, however small.

3. When the members are equally divided, the will of the company is presumed to be in favour of the existing state of matters, which consequently remains unaltered.

4. The will of a majority is only the will of the company when all the members have voted, or have had it in their power to vote, and when a *bona fide* opinion has been given after due consideration.

5. When in the instrument of formation rules have been prescribed for ascertaining the will of the company, it can only be declared by resolutions in the passing of which these rules have been observed.

The above propositions have long been held as settled law in England in the case of corporations, in which the fictitious person is fully recognised (*a*). They have since been applied to unincorporated associations, though in these the law of England does not recognise the *quasi persona*. And they are still more in accordance with the theory of Scotch law which recognises not only a person in corporations, but a *quasi* person in common law companies and firms.

It will now be necessary to examine these propositions somewhat in detail.

1. Where the instrument of formation has not otherwise provided, the will of the majority is the will of the company in all matters within the sphere of its operations. First rule.

This rule applies in all cases where, from the nature of the con-

(*a*) See Grant on Corporations, pp. 60 *et seq.*

tract, the company is vested with a discretionary power, and where its exercise is not entrusted to certain individuals other than the majority (*a*). Thus, where the company was plainly intended to have the power of borrowing money, the majority was found entitled to do so against the wishes of a minority (*b*).

When, again, a single partner opposed a sale of company lands which was about to be made by the directors with concurrence of a majority of the shareholders, he was found not entitled to interfere, the Court holding that from the nature of the contract this power must have been conferred on the company (*c*).

So also the majority have power to dissolve an unincorporated company, when they consider it likely to prove abortive, against the wishes of a minority (*d*).

And, in like manner, a majority has been found entitled to assign the company property to trustees for sale, and distribution amongst the company creditors (*e*).

It has even been held in England, that a majority may, contrary to the desire of a minority, make a division of profits before paying an outstanding debt (*f*).

As illustrative of the principle that the will of the majority is the will of the company when acting within the sphere of the original contract, reference may be made with advantage to the case of joint-stock companies incorporated or seeking to be incorporated by Act of Parliament. In such cases, the parliamentary contract or the special act is held to contain the company's constitution; and the will of the majority has always been allowed to prevail where it was exercised within the purposes for which the association was created (*g*).

(*a*) Story on Part. s. 124; Stair i. 16, 4; Pothier de Société, n. 71, 90. See also cases of directors representing the will of the company.

(*b*) See *Bryon* v. *Metropolitan Saloon Co.*, 3 De G. and J. 123; *Australian Aux. Clipper Co.*, 4 K. and J. 733.

(*c*) *Fleming*, 1845, 7 D. 935.

(*d*) *Logie* v. *Gordon* (1725), M. 14580; *Montgomery* (1791), M. 14583; *Kent* v. *Jackson*, 14 Beav. 367.

(*e*) *Lord* v. *Governor and Co. of Copper Mines*, 2 Ph. 740.

(*f*) *Stevens* v. *South Devon Ra. Co.*, 9 Ha. 313.

(*g*) See *Williamson* v. *North British Ra. Co.*, 1846, 9 D. 255; *Wedderburn* v. *Scottish Central Ra. Co.*, 1848, 10 D. 1317; *National Exchange Company of Glasgow*, 1849, 11 D. 571; *Graham* v. *North British Bank*, 19 June 1849, 11 D. 1165; *Blackburn* v. *Stewart*, 1851, 13 D. 1243.

2. The will of the majority is not the will of the company to any effect beyond or in opposition to the purposes of its formation, and does not in such cases bind a dissenting minority, however small. Second rule.

In cases of this kind, the company as an artificial person cannot be said to have any volition at all, because they lie beyond the sphere of action for which it was created. The will of a majority, however large, does not therefore represent the will of the company; for *ex hypothesi* it has no will to represent. This has also been long settled in the law of England; and though it does not in that system rest on the clear principle of the Scotch law, that the artificial person of the company cannot will or act beyond the sphere for which it was created, it is supported on those general grounds of justice and expediency of which, taken as a whole, the Scotch doctrine must be regarded as the artistic embodiment. In England each partner is entitled to say, 'I became a partner in a concern formed for a definite purpose, and upon terms which were agreed upon by all of us; and you have no right without my consent to engage me in any other concern, or hold me to any other terms, or to get rid of me, if I decline to assent to a variation in the agreement by which you are bound to me and I to you' (*a*).

The cases of *Natuch* v. *Irving* (*b*), and *Const* v. *Harris*, 1824 (*c*), both the subject of elaborate decisions by Lord Eldon, have been always regarded as the leading authorities upon this question, both in England and in this country. In *Natuch* v. *Irving* it was proposed to turn a Fire and Life Insurance Company into a Marine Insurance Company. A single shareholder objected, and the company offered to return him the deposits he had paid on his share, with interest. He declined to accede to this proposal, and filed his bill for an injunction to restrain the directors from effecting marine insurances, and the injunction was granted.

In *Const* v. *Harris*, the partners of a theatrical company, eight in number, arranged by their original agreement that the profits should be exclusively appropriated for certain special purposes. Seven of the eight afterwards resolved that the profits should be applied in a different manner; the eighth partner dissented, and,

(*a*) Lindley 510.
(*b*) Gow on Part. App. 398.
(*c*) Turn. and R. 496.

upon his filing a bill, Lord Eldon gave a judgment similar to that pronounced in the preceding case.

In the case of *Maxton* v. *Brown*, 1839 (*a*), a joint-stock company had been formed for the purpose of carrying goods and passengers between Great Britain and Australia. The directors, with the implied consent of a majority of the shareholders, embarked in the trade of taking goods on commission from merchants in Britain, and guaranteeing the sales in Australia. In an action of declarator and damages at the instance of a minority of the partners, it was held that this innovation in the business of the company was incompetent, inasmuch as, though it was not prohibited, it was not contemplated in the original contract.

Since these decisions the principle seems never to have been disputed, that a majority cannot, in opposition to a dissentient minority, however small, do anything beyond the purposes for which the company was constituted; and though many decisions have since been given, both in this country and in England, embodying this principle in various forms, the question has always been whether, in the particular circumstances of the case, the resolutions of the majority were or were not within the limits of the company contract.

Thus, in *Brown* v. *Sir C. Adam* (*b*), interdict was granted at the instance of a dissenting minority against a majority who wished to apply deposits on shares to the expenses of obtaining a special act after the first application had been unsuccessful. And an injunction has been obtained against a majority who sought to apply the company funds for the purpose of altering the constitution of the company by a new act (*c*), against a majority seeking to transfer the company business and property to another company (*d*), and against a majority resolving to make a railway in a different locality from that for which the company was formed (*e*). A majority has also been restrained from making presents out of the company funds to

(*a*) 1 D. 367.

(*b*) 1848, 10 D. 744.

(*c*) *Munt* v. *Shrewsbury Ra. Co.*, 13 Beav. 1; *Vance* v. *East Lanca. Ra. Co.*, 3 K. and J. 50. Compare *Blackburn* v. *Stewart*, 1851, 13 D. 1243; *Bright* v. *North*, 2 Ph. 216.

(*d*) *Winch* v. *Birkenhead Ra. Co.*, 5 De Gex and S. 562; *Salomons* v. *Laing*, 12 Beav. 377; *Newcastle and Carlisle Ra. Co.*, 5 E. Jur. N. S. 1096.

(*e*) *Simpson* v. *Dennison*, 10 Ha. 51; *Bagshaw* v. *Eastern Rail. Co.*, 7 Ha. 114.

directors (*a*), from forfeiting shares (*b*), from making bye-laws (*c*), from reducing the capital of the company (*d*), and from purchasing stock in another company (*e*), when such proceedings were contrary to, or not sanctioned by, the provisions of the original contract, or other instrument of formation.

In the case of *Wilson* v. *Glasgow and South-Western Railway Co.*, interdict was granted at the instance of a single shareholder against the company applying any sums raised by the issue of new shares to any other purpose than that of paying off the existing statutory debts, until they should be reduced to the amount which the company was entitled to continue under its special acts (*f*).

In all these and many similar cases, the *ratio decidendi* was, that the majority were seeking to extend their sphere of action beyond the limits within which, by the instrument of its formation, the company was entitled to act.

Power of one dissentient member.

It might at first sight be supposed, that when all the partners or shareholders were, with a single exception, unanimous in a resolve to change the nature of the concern, by restricting, extending, or altering its sphere of action, they would be entitled to get rid of the opposition of the dissenting member by tendering him the value of his interest in the concern. But this is not competent, except when the copartnery may be dissolved at the will of any one of its members; and when such is the case, the change can only be made by means of a regular dissolution, with all its attendant results.

The following extract from the judgment of Lord Eldon, in the case of *Natuch* v. *Irving*, already referred to (*g*), may be quoted, not only as settling this question, but as tending to show that the doctrine of the separate person of the firm, which receives such prominence in the law of Scotland, is sometimes tacitly implied even in the law of England :—

'It is not competent, I apprehend, to any number of persons in a partnership (unless they show a contract rendering it competent to them) formed for specific purposes, if they propose to form a

(*a*) *York and N. M. Rail.* v. *Hudson*, 16 Beav. 485.
(*b*) *Barton*, 4 Drew 535.
(*c*) *Adley* v. *Whitstaple Co.*, 1 Mer. 107.
(*d*) *Smith* v. *Goldsworthy*, 4 Q. B. 430.
(*e*) *Balfour's Trs.*, 10 D. 1240. Compare also *Nat. Ex. Co.*, 11 D. 571.
(*f*) 1850, 13 D. 227.
(*g*) Gow on Part. App. 398, 3d edition, and 411, 2d edition.

partnership for very different purposes, to effect that formation by calling upon some of their partners to receive their subscribed capital and interest, and quit the concern; and in effect, merely by compelling them to retire upon such terms, so to form a new company. This would, as to partnerships, be a most dangerous doctrine. When a partnership is dissolved (even where it can be in a sense dissolved the instant after notice to dissolve has been given, if there be no contract to the contrary), it must still continue for the purpose of winding up its affairs, of taking and settling all its accounts, and converting all the property, means, and assets of the partnership existing at the time of dissolution, as beneficially as may be, for the benefit of all who were partners, according to their respective shares and interests; and the other partners cannot say to him to whom they have given an offer of his deposit and interest, Take that, and we are a new company, keeping the effects, means, assets, and property of the old, as the property of the new partnership. The company will indemnify the plaintiff against loss by its transactions, already had or hereafter to be had, not for the specified purposes of the institution. But the right of a partner is to hold to the specified purposes his partners whilst the partnership continues, and not to rest upon indemnities with respect to what he has not contracted to engage in. A dissatisfied partner may sell his shares for double what he originally gave for them. But he cannot be compelled to part with them for that reason; it may be his principal reason for keeping them, having the partnership concern carried on according to contract. The original contract, and the loss which his partners would suffer by a dissolution, is his security that it shall be so carried on for him and them beneficially, and with augmented improvement in the value of his shares and their shares.'

Third rule. 3. When the members are equally divided, the will of the company is presumed to be in favour of the existing state of matters, which consequently remains unaltered.

An example of the operation of this rule will be found in the English case of *Donaldson* v. *Williamson* (*a*), 1830. There it was held that one of two partners could not dismiss a company servant against the will of the other. In this respect, the Roman law was

(*a*) 1 Cr. and M. 345.

the same. *In re communi neminem dominorum jure facere quicquam, invito altero, posse. Unde manifestum est prohibendi jus esse; in re enim pari, potiorem causam esse prohibentis constat* (*a*).

It may be observed, however, that cases of this kind are of very rare occurrence; for in the general case the proper course to be pursued will be found indicated either expressly or by implication in the original contract, so that very little room is left for the exercise of discretion within the limits of the company's sphere of action; and the fact that a partner refuses to concur in acts plainly necessary for ordinary administration, forms, when the partnership is for a term, a good ground for applying for judicial interference to dissolve and wind up the concern (*b*).

It must also be borne in mind, that where any antecedent obligation has been undertaken by the company, the will of that section of the members who wish to fulfil such obligation will prevail against the wishes of an equal number who oppose, and will be held to be the will of the company; for it cannot be presumed that a company any more than an individual intends to escape from the performance of obligations which may be enforced by legal proceedings (*c*). In such a case the *dictum* of the civilians would seem to apply: *Sed etsi in communi prohiberi socius a socio ne quid faciat potest, ut tamen factum opus tollat cogi non potest, si cum prohibere poterat hoc prætermisit* (*d*).

Fourth rule.

4. The will of the majority is only the will of the company, when all the members have voted, or have had it in their power to vote, and when a *bona fide* opinion has been given after due consideration. The reason of this is, that in every partnership, whether it is expressed or not, all the partners are bound to be true and faithful to each other; and, unless the contrary has been arranged, are not only entitled, but bound, to give due consideration to the common affairs, and to give the best of their advice and judgment. Hence, when any question arises as to company management, the proper course is to call a meeting of all the members, or otherwise to enable them all to express their opinion on the matter. And

(*a*) Dig. lib. x. tit. 3, l. 28. See also Story on Part. sec. 123; Stair i. 16, 4; Bankt. i. 22, 9.

(*b*) *Butchart* v. *Dresser*, 1853, 4 De G. M. and G. 542.

(*c*) *Butchart* v. *Dresser*, *supra*.

(*d*) Dig. l. x. t. 3, l. 28.

hence also it is the duty of every partner to form his opinion not only on a full consideration of the matter submitted to the meeting, but after fairly weighing the opinions and arguments of such of his copartners as may be disposed to entertain views differing from his own.

As consequences of these principles, it may be observed that the resolutions of a majority will not be deemed those of the company when they have been passed in pursuance of a determination to thwart the views of the minority in spite of all that could be urged to the contrary; and resolutions passed at a meeting where all the members were not present or duly warned to attend, will not be validated by evidence that, though all had been present, the majority would still have been in favour of the resolutions; for if the proceedings had been conducted regularly and in *bona fide*, it is impossible to tell how far the minority might by argument have changed the views of their fellows (*a*).

Fifth rule.

5. When in the instrument of formation rules have been prescribed for ascertaining the will of the company, it can only be declared by resolutions in the passing of which these rules have been observed. This plainly follows from the consideration, that as the company owes its existence to the will of its members, it lay with them to determine at its formation in what manner its will was to be ascertained; and that the rules laid down in the instrument of formation were conditions of the contract, in virtue of which the members agreed to form themselves into an association (*b*).

(*a*) See, as to this, *Const* v. *Harris*, 1824, Turn. and R. 518; *ex parte Morrison*, 1847, De Gex 539; *Brown* v. *Andrew*, 13 E. Jur. 938; Story on Part. sec. 123.

(*b*) See Story on Part. sec. 125.

CHAPTER X.

POWERS OF PARTNERS.

Private partnerships act and transact by their partners.

PRIVATE partnerships act and transact with the public or their own members as individuals; but being artificial persons, their intercourse is carried on by the intervention of agents. These agents are the partners.

English and Scottish theories contrasted.

In England, where the separate *persona* of the firm is not recognised, the individual partners are regarded as the agents of each other in matters relating to the common undertaking. Hence it follows, that whatever is done by the individual partners as partners, is in Scotland said to be done by them as agents for the company; but in England as agents for each other.

Practical effects.

In the great majority of cases this theoretical difference has no practical effect, but instances do occur where its consequences are discernible. When any such require notice, they will be pointed out in the course of this inquiry.

Agency.

Since the partnership acts and transacts by means of its partners, the law which regulates the powers of partners must be taken to be a branch of the law of principal and agent,—a proposition which holds true not only in Scotland, but in every other country where commercial jurisprudence has assumed a systematic form (*a*).

Civil law.

According to the civilians, the partnership contract did not *ipso jure* invest all the partners with the power of agency; but it was restricted to those of their number upon whom it was specially conferred, though its possession by the others might be inferred from facts and circumstances (*b*). But in the English, Scottish,

(*a*) Pothier Pand. lib. xvii. t. 2, art. 26 to 29; 1 Domat. B. i. t. 8, s. 4, art. 16; Dig. lib. xvii. t. 2, 1, 68; Story on Part. sec. 109; Story on Agency, s. 124, note (1); Pothier, *de Société*, n. 96; opinions of Lords Cranworth and Wensleydale in *Cox* v. *Hickman*, 8 House of Lords Cases 306.

(*b*) Pothier, Domat., and Dig., *ut antea*.

American, and modern French systems of jurisprudence, the partners are held to be *præpositi negotiis societatis*, without any express stipulation, and by the mere fact of entering into the partnership relation (*a*).

Agency is either express or implied.

Agency is either implied or express. If a man appoint another his agent to represent him in some line of trade, all such powers as are necessary to carry on the business in the ordinary way are presumed to be conferred; and the public are safe to deal with the agent within that sphere of action as if he were the principal. But beyond this there are many things which the principal may, for reasons of his own, choose to do, though they are neither necessary nor usual in his line of business. As to these, an agent has no implied powers, and the public are only in safety to transact with him when they are satisfied that he has express authority from his principal (*b*).

Hence powers of partners are either implied or express.

This doctrine of agency forms part of the law of partnership, and divides the powers of partners into two classes: 1. Implied or common powers; and 2. Special or express powers;—the former being such as arise out of the mere fact of partnership; the latter being such as are specially conferred by the company. In the words of Mr Justice Story (*c*), 'each partner may enter into any contracts or engagements on behalf of the firm in the ordinary trade or business thereof; as, *e.g.*, by buying or selling or pledging goods, or by paying or receiving or borrowing monies, or by drawing or negotiating or indorsing or accepting bills of exchange, promissory-notes, and cheques, and other negotiable securities, or by procuring insurances for the firm, or by doing any other acts which are incident or appropriate to such trade or business, according to the common course and usages thereof. So each partner may consign goods to an agent or factor for sale on account of the firm, and give instructions and orders relating to the sale.'

(*a*) Lindley 192; Bisset 66; Stair i. 16, 4; Bankt. i. 22, 5 *et seq.*; Ersk. iii. 3, 25; Story on Part. ch. vii.; *Code Civil*, Act 1859; Pothier, *de Société*, No. 90 to No. 100; Pothier on Oblig. n. 83, 89.

(*b*) *Rawson and Co.* v. *Johnstone*, 1833, 11 S. 1011; *Steel and Co.* v. *Hoome and Co.*, 1834, 12 S. 810; *Hampton* v. *Adam*, 1839, 1 D. 500; *Ferm* v. *Harrison*, 1 Ross Le. Ca. 350, 3 T. R. 757; *Whitehead* v. *Tuckett*, 15 East 399, 3 Ross Le. Ca. 140; *Robinsons* v. *Middleton*, 1859, 21 D. 1089.

(*c*) Part. sec. 102.

In considering, therefore, whether any given power is implied or not, the real question is, Whether it is necessary for carrying on the business of the firm, whatever that may be, in the ordinary way, and in ordinary circumstances? Hence there is no implied power to do what, though not necessary, is convenient or beneficial, or what, though unusual, may be defended on the head of urgency. To do such things requires the authority of the principal, that is, in the case of partnership, of the whole or at least a working majority of the partners (*a*).

Private arrangements.

It is by no means uncommon for the members of a firm or co-partnery to make a private arrangement among themselves, whereby the institorial power is limited or apportioned among their number. A firm of five may, *e.g.*, agree that two only shall have the power of management, or that three shall have the sole charge of one department and two of the other. Such private arrangements, though binding *inter socios*, are powerless in a question with the public while in ignorance of their existence, to avoid the operation of the implied agency (*b*). Thus a company of horse-dealers, who have agreed never to warrant a horse, are still effectually bound by the warranty of one of their number, because it is the general practice of the trade to give warranty (*c*). So a private arrangement by a mercantile firm not to grant bills or notes in the company name has been found no defence against the act of a partner who has transgressed the rule, in the case of a stranger who was not aware of its existence (*d*). So also a firm was

(*a*) *M'Nair and Co.* v. *Gray, etc.*, 1803, Hume 753; *Kennedy*, 1814, 18 F. C. 122; *Mattheson* v. *Fraser*, 1820, Hume 758; *Clarke* v. *Shepherd*, 1821, 1 S. 179; *Turnbull* v. *M'Kie*, 1822, 1 S. 331; *Johnston and Co.* v. *Phillips*, 1822, 1 S. App. 244; *Royal Bank of Scotland* v. *Greenock Bank*, 1794, aff. 1797, 3 Paton's App. 595; *Tupper* v. *Rowell and Co.*, 1858, 20 D. 758; *Balfour's Trs.* v. *Edin. and Nor. Ra. Co.*, 1848, 10 D. 1240; *Brettel* v. *Williams*, 4 Ex. 630; *Hawtayne* v. *Bourne*, 7 M. and W. 595; *ex parte Chippendale*, 4 De G. M. and G. 19; *Dickinson* v. *Valpy*, 10 B. and C. 128, 3 Ross Le. Ca. 561; *Crellin* v. *Brook*, 14 M. and W. 11; *Ricketts* v. *Bennet*, 4 C. B. 686. These cases afford good illustrations of the doctrines here enunciated. See 'Powers of Majorities.'

(*b*) See *per* Lord Tenterden in *Sandilands* v. *Marsh*, 3 Ross Le. Ca. 463, 2 Barn. and Ald. 677; *Smith* v. *Jamieson*, 5 T. R. 601; *Craven* v. *Widdows*, 2 Ch. Cas. 139; *Hubert* v. *Nelson*, Davies, B. L. 8, Coll. 260; Watson on Part. 168.

(*c*) 2 Barn. and Ald. 679.

(*d*) *Turnbull* v. *Mackie*, 1822, 1 S. 331; *Bruce and Co.* v. *Beat*, Dec. 10, 1765, F. C., M. 4056, House of Lords,

held bound by the act of a partner who chose to interfere in a department of the business from which by arrangement he was excluded (*a*).

Effect of notice.

But the partnership will not be bound when the creditor had express notice that the agency of the partner with whom he transacted was limited by private arrangement (*b*). And in like manner, a disclaimer by one partner of liability for future acts of his copartners has been held to constitute a withdrawal of agency in a question with those who received such notice (*c*).

Ratification.

It must be observed, however, that even though a partner plainly exceed his authority, his acts may be rendered binding by ratification. And this does not require any formal procedure, but may be inferred from facts and circumstances (*d*)—*e.g.* subsequent knowledge of the act without repudiation (*e*).

Questions *inter socios.*

The consequences of unauthorized acts, when the question arises between the company and its own partners, are very different. If a partner transact with another of several partners, in relation to a matter as to which the agency of that partner has been withdrawn, the transaction is simply null as regards the company, because all the partners ought to know the rules of their own concern. If, however, it could be shown that the particular partner had been kept in ignorance of a rule which had been adopted by his copartners, the case might be different. Of course, any partner transgressing a known rule of the company is always liable to indemnify his fellows.

Peculiar doctrine of English law.

It may here be proper to advert to a peculiarity in the law of England, which, in so far as we are aware, has never been recognised in this country. It appears to be settled law in England that

3 Dow 318 (1768); *South Carolina Bank*, 8 Barn. and Cress. 427, 3 Ross Le. Ca. 508.

(*a*) *Morans* v. *Armstrong*, Arm. M'Artn. and Ogle, Irish Nisi Prius Reports 25.

(*b*) *Miller* v. *Douglas*, 1811, 16 F. C. 154; *Minnet* v. *Whitsey*, 5 Bro. P. C. 489; *Vice* v. *Fleming*, 1 Younge and Jerv. 227; *ex parte Harris*, 1 Mudd. 583; *Hope* v. *Cust*, 1 East 51; *Sheriff* v. *Wilkes*, 1 East 48; *Ridley* v. *Taylor*, 13 East 175, 3 Ross Le. Ca. 486–507; *Swan* v. *Steele*, 7 East 209, 3 Ross Le. Ca. 459.

(*c*) *Wyllis* v. *Dyson*, 1 Stark. 164; *Booth* v. *Quin*, 7 Price 193; *Galway* v. *Matthew*, 1 Camp. 438, 3 Ross Le. Ca. 507.

(*d*) *Crellin* v. *Brook*, 14 M. and W. 11; *ex parte Bonbonus*, 8 Ves. 540, 3 Ross Le. Ca. 470.

(*e*) *Bo'ness Canal Proprietors* v. *M'Alpine*, 1791, Hume 751, M. 14572.

one partner has no authority to bind his copartners by deed, unless he be expressly empowered to do so by another deed (*a*). And it has accordingly been held, that a bond for payment of duties on goods belonging to the partnership does not bind the firm, but only the partner by whom it has been executed in name of the firm (*b*). This peculiarity in the law of England has led to much practical inconvenience, and has in America been put an end to by an Act of Congress (*c*).

The technical reason for its existence is the rule that all deeds must be under seal; and as unincorporate companies have no common seal, nothing short of the adhibition of all the partners' seals, either to the deed itself or to another deed authorizing its execution, will satisfy the requirements of law. It has also been equitably defended on grounds of public policy, as being a safeguard against the exercise of too great power by individual partners. But, in truth, it seems to be one of the consequences of the non-recognition of the *quasi* person of the company firm. If this were recognised, the company would either have its own seal, or each partner would be entitled to make use of his private seal, so as to bind the firm under his implied agency.

So far as we are aware, the question has never been raised in Scotland, whether a deed—that is to say, a formal document in contradistinction to a bill or note—can be executed by one partner in the social name, so as to bind the firm. This mode of execution appears, however, to be not unusual in practice; and it would probably be held effectual, if the deed were in the line of the company business (*d*).

Onus of fixing obligation against company.

Where from the form of the instrument creating the obligation it is doubtful whether the credit of the company, or merely that of the signing partner as an individual, was intended to be pledged, the *onus* of showing that the contract is binding on the company will in general lie on the party seeking to make it effectual. Thus, where the name of a firm was the name of a partner, and the business was carried on in his name only, the holder of a bill granted

(*a*) *Harrison* v. *Jackson*, 7 T. R. 207, 3 Ross Le. Ca. 557.

(*b*) *Metcalf* v. *Rycroft*, 6 Maule and Selwyn 75; Story, Part. sec. 119; Lind. 223.

(*c*) Story on Partnership, sec. 119, note 1.

(*d*) See *Christie* v. *Reid*, 1826, 4 S. 372.

by that partner was held bound to show that it was granted by the partner as representing the firm, and not by himself as an individual (*a*).

(*a*) *South Carolina Bank* v. *Case*, 1828, 3 Ross Le. Ca. 508, 8 B. and C. 427; and see also *per* C. J. Cockburn in *Nicholson* v. *Ricketts*, 6 E. Jur. N. S. 422. See also *Stephen* v. *Reynolds*, 5 H. and N. 513; Story on Part. sec. 139; *U. S. Bank* v. *Burney*, 5 Mast. 176, and *Etherton* v. *Burney*, 1 Pick. 274, American cases, and both quoted in Ross Le. Ca. 516–17.

CHAPTER XI.

POWERS AND DUTIES OF DIRECTORS.

Difference between joint-stock companies and firms.

JOINT-STOCK companies differ from private partnerships in having a large and fluctuating body of members, in relation to whom there is no *delectus personæ*, and who can in no sense be regarded either as the agents of the company or of each other. What they contribute is not ability, skill, or industry, but money. The affairs of such associations are accordingly carried on, not by the partners or shareholders, but by directors, managers, or other officials specially appointed for that purpose. These, and not the partners, are the agents of the company.

This doctrine applies not only to corporations, but to all joint-stock companies whatsoever deserving the name; and it is so based in equity and even necessity, that in all transactions with such associations the public are held entitled to deal with the proper officials only (*a*).

Officials as contrasted with partners.

As a general rule, it may be assumed that the managing officials of a joint-stock company hold the same kind of agency in relation to it that partners do in relation to a private firm; and it will be found that the principles which regulate the special and implied powers of both are very similar or analogous (*b*). Much of what has been already said in regard to the agency of partners, is therefore applicable to managing officials.

Points of difference in the power of agency.

There are, however, some peculiarities or points of difference which it is of importance to notice. In the case of private firms, the sphere of implied agency includes all that is usual and necessary in the particular line of business prosecuted; but this is not always the case in joint-stock companies. If the company is a corporation,

(*a*) *Forth Marine Insurance Co.*, reported in House of Lords as *Burness* v. *Pennel*, 6 Bell's App. 541, and 2 House of Lords Cases 497 (1849).

(*b*) *Macalister* (*Caledonian Dairy Company*) v. *Alexander*, 1843, 5 D. 580.

its sphere of action may be greatly restricted by its charter or special act, within what would naturally be implied from the character of its business. In such a case the directors have no power to bind the company beyond the limits of its constitution; and any transaction beyond the prescribed sphere of action, entered into by them as for the company, will be a mere nullity as regards the company, though it may subject such officials in damages to the party aggrieved. Nay, so much is this the case, that no ratification of an act *ultra vires* of a company incorporated by charter or special act will be of much avail towards rendering it valid (*a*).

Common law companies.

Even as regards joint-stock companies which are not incorporated, but exist only under the common law, the leaning of the tribunals is towards the adoption of a similar principle. When, in such a case, the articles of association restrict the company's sphere of action within what would be implied from the nature of the undertaking, the public have been held bound to make themselves acquainted with the restriction (*b*). But the soundness of this view has been questioned (*c*); and a person employed by directors to do ordinary work has been held not bound to inquire whether they were acting within the limits of their power (*d*). However this may be, there seems no reason to doubt that transactions entered into by directors in unincorporated companies, beyond the prescribed sphere of operations, are always capable of being ratified by the whole body of shareholders, or even by *rei interventus*, provided it has been sufficiently marked, and of sufficiently long duration to involve their acquiescence (*e*). But the Court will never compel the company to implement a contract which was plainly *ultra vires* of the directors, and had not been validated by ratification (*f*).

Ratification.

Onus of proof.

When transactions of this kind have actually been carried out, the *onus* of showing that they were *ultra vires* of the constitution of

(*a*) *Keene's Executors*, 3 De G. M. and G. 272; *Soc. of Practical Knowledge*, 2 Beav. 559; *Eastern Union Ra. Co.*, 7 Ha. 114.

(*b*) *Per* Lord Wensleydale in *Ernest* v. *Nicholls*, 6 House of Lords Cases 419; *Maxton* v. *Brown*, 1839, 1 D. 367; *Dickinson* v. *Valpy*, 1829, 3 Ross Lc. Ca. 561.

(*c*) *London Dock Co.* v. *Sinnott*, 8 E. and B. 347.

(*d*) *Green* v. *Nixon*, 22 Beav. 530.

(*e*) *Maxton* v. *Brown*, *supra*; *Fleming* v. *Campbell*, 1845, 7 D. 935; *Re Richmond*, 4 Kay and J. 305; *Morgan's* case, 1 De G. and S. 750; *Lawes'* case, 1 De G. M. and G. 443.

(*f*) *Ellis* v. *Colman*, 25 Beav. 662.

the company appears even in the case of incorporated associations to lie on those challenging their validity; for it is not to be presumed that the transaction was beyond the sphere of the company's power until this has been plainly made to appear (*a*). The case is different when directors are sought to be interdicted from doing something not yet accomplished, on the ground that it is *ultra vires* of the company. Here the *onus* would seem to lie on the directors to show that the contemplated act is within the powers of the company as defined in its constitution, particularly if that constitution has been conferred by charter or special act (*b*).

Non-observance of formalities, etc.

If the directors have power by the constitution of the company to do certain acts in its name, the company will be effectually bound, though the acts in question have not been carried through with all the formalities, and in the manner required by the deed of constitution. So, where directors were empowered to borrow money, the company was held bound, though the money had been borrowed without fulfilment of a condition precedent, which required a general resolution of the shareholders before this power could be exercised (*c*). And where a protracted litigation had been engaged in by officials on behalf of the company, in which the company was ultimately found liable in expenses, allegations to the effect that the officials had no right to involve the company in the litigation were disregarded, as it appeared the company had homologated their proceedings by acts, and at least by silence (*d*).

The present state of the law on this subject may be perhaps best indicated by the following quotations from the opinions of two eminent English judges.

Lord Wensleydale's *dictum*.

'All persons,' said Lord Wensleydale, 'must take notice of the deed and the provisions of the Act (referring to a Registration Act).

(*a*) *Per* Lord Cranworth in *Shrewsbury Ra. Co.*, 6 House of Lords Cases 113. See also *Bostock* v. *N. Stafford Ra. Co.*, 4 E. and B. 798; *South Wales Ra. Co.* v. *Redmond*, 10 C. B. N. S. 675. See, as to this matter generally, *Great Nor. Ra. Co.*, 1 Dr. and Sm. 154; *Phœnix Life Assur. Co.*, 2 J. and H. 441; *Manchester and Sheffield Ra. Co.*, 7 E. Jur. N. S. 887; *West Cornwall Ra. Co.*, 2 H. and N. 703. And see Lindley, Sup. 43.

(*b*) *Colman* v. *Eastern Co. Ra. Co.*, 10 Beav. 1; *Bagshaw* v. *East. Ra. Co.*, 7 Ha. 114; *Simpson* v. *West Palace Hotel Co.*, 1 De G. F. and J. 141.

(*c*) *Royal British Bank* v. *Turquand*, 5 Ell. and Bl. 248, and 6 Ell. and Bl. 327; *Athenæum Life Ins. Soc.* v. *Pooley*, 5 E. Jur. N. S. 129.

(*d*) *Ramsay* v. *Smail*, 1840, 2 D. 1336.

If they do not choose to acquaint themselves with the power of the directors, it is their own fault; and if they give credit to unauthorized persons, they must be contented to look to them only, and not to the company at large. The stipulations of the deed which restrict and regulate their authority are obligatory on those who deal with the company; and the directors can make no contract so as to bind the whole company of shareholders, for whose protection the rules are made, unless they are strictly complied with. The contract binds the persons making it, but no one else (*a*).' In a subsequent case (*b*), Vice-Chancellor Wood approved of these observations, but explained and qualified them as follows: 'There is no doubt an important distinction to be drawn between that which on the face of it is manifestly imperfect when tested by the requirements of the deed of settlement of the company, and that which contains nothing to indicate that those requirements have not been complied with. Thus, where the deed requires certain instruments to be made under the common seal of the company, every person contracting with the company can see at once whether that requisition is complied with, and he is bound to do so; but when the conditions required by the deed consist of certain internal arrangements of the company,—for instance, resolutions at meetings and the like,—if the party contracting with the directors finds the acts which they undertook to do to be within the scope of their power under the deed, he has a right to assume that all such conditions have been complied with. In the case last supposed, he is not bound to inquire whether the resolutions have been duly passed, or the like; otherwise he would be bound to go further back, and to inquire whether the meetings have been duly summoned, and to ascertain a variety of other matters into which if it were necessary to inquire, it would be impossible for the company to carry on the business for which it was formed.'

V.-C. Wood's *dictum*.

Officials are special agents.

Furthermore, the position of managing officials differs from that of partners in this respect, that whereas the authority of partners to represent the firm is implied by the mere fact of partnership, that of managing officials to represent the company is the result of direct appointment. The agency of the one may therefore be taken as implied, that of the other as special. Now, if a

(*a*) *Per* Lord Wensleydale in *Ernest* v. *Nicholls*, 6 House of Lords Ca. 419.

(*b*) *Ex parte The Eagle Company*, 4 K. and J. 549.

man entrust the management of his affairs not to one person, but to several, the general rule is that they proceed by majorities; but he may make it a rule that certain acts shall only be binding on him when they are agreed to by the whole body of his agents, by a certain majority, or by a *sine quo non*. From this it would seem to follow, that when the management of the affairs of a joint-stock company is entrusted to a board of officials, the presumption is for management by majorities, but that when it forms a condition that their acts shall only be binding when the whole or a certain number concur, no act will be valid which has not obtained the concurrence of the required number (*a*). When, however, the assent of the required number has been obtained, the observance of merely formal conditions, such as that it shall be given at a board meeting, does not seem to be of importance (*b*). And when the number of directors was fixed by the special act at twelve, of whom five should be a *quorum*, the fact that the number had been reduced to seven was not found to invalidate their proceedings (*c*). Officials specially appointed to represent the company in certain departments do not bind it in relation to matters which do not fall within these departments (*d*).

Officials not binding company bind themselves.

Managing officials who exceed the power committed to them, and consequently do not bind the company, are nevertheless liable in indemnity to such of the public as have been misled by their misrepresentations. Yet, seeing they are not agents for each other, they do not bind such of their number as were not parties to the acts in question (*e*).

Ratification by directors

It seems too obvious a proposition to require argument, that directors cannot render binding on the company contracts or transactions into which they had originally no right to enter, by any subsequent ratification by themselves, however formal; for what it exceeded their authority to do, they could not, when done, render valid. And this, no doubt, is the general rule. Yet it must be

(*a*) *Kirk* v. *Bell*, 16 Q. B. 290; *Ridley* v. *Plymouth Grinding Co.*, 2 Ex. 711; *Fife and Kinross Ra. Co.* v. *Deas*, 1859, 21 D. 187; *Brown* v. *Andrew*, 13 E. Jur. 938.

(*b*) See *The Royal British Bank* v. *Turquand*, 5 Ell. and Bl. 248, and *ibid.* 327; *Bargate* v. *Shortridge*, 5 House of Lords Cases 297.

(*c*) *Thames Haven Dock Co.* v. *Rose*, 4 Man. and Gr. 552.

(*d*) *Nat. Exch. Co.*, 23 D. 1.

(*e*) *Haddon* v. *Ayers*, 5 Jur. N. S. 408, Q. B.; *Ellis* v. *Colman*, 25 Beav. 662.

observed, that as the company transacts only by its directors as its agents, the will of the company can in many cases be discoverable by the public through their actings alone, which are therefore *in dubio* to be presumed in conformity with that will. Hence, when contracts originally invalid from having been *ultra vires* of the directors, have nevertheless been for a sufficiently long period acted upon by the directors as valid and binding, they will be held ratified by the company. The contrary doctrine would involve the untenable proposition, that a company could not ratify by acquiescence, or even by *rei interventus*, nor indeed in any other way than by formal resolution (*a*). It must be noticed, however, that this does not apply where the transaction has been tainted with fraud in the shareholders, to which the party or any in his right seeking implement has been privy (*b*).

Strangers appointed to act as agents.

When a company or firm appoints a stranger to act as manager, he is a mere officer or servant of the company, and has no right to object to their resolutions (*c*). But where some of the partners are specially appointed to act for the company, the case is different. They do not by such appointment cease to enjoy their rights as partners; so that even when it was provided by the articles of copartnery that the agents should find security, partners who had been appointed agents were held not bound by this provision (*d*).

Directors are trustees and special agents for the company.

Those office-bearers by whom the management of joint-stock companies is carried on, are, as we have already seen, the agents of the company specially constituted for that purpose. They are also in a great measure to be considered as trustees for the interests of the whole body of the shareholders (*e*). Hence they are bound in a much higher and stricter sense than mere partners to do their utmost to further the prosperity of the association, to promote its interests even at the expense of their own, and to discharge the duties of their office with the diligence and assiduity expected from regular mercantile agents. In most cases they receive direct remuneration for their services out of the company funds; yet the

(*a*) See *Smith* v. *Hull Glass Company*, 11 C. B. 897; *Reuter* v. *The Electric Telegraph Company*, 6 E. and B. 341.

(*b*) *Athenæum Life Insur. Co.* v. *Pooley*, 5 E. Jur. N. S. 129.

(*c*) *Paul* v. *Taylor*, 1826, 4 S. 580.

(*d*) *Edinr. and Leith Shipping Co.* v. *Downe*, 1832, 10 S. 557.

(*e*) *Williams* v. *Page*, 24 Beav. 654; 4 E. Jur. N. S. 102; *Charitable Corporation* v. *Sutton*, 2 Atk. 400.

circumstance of their agreeing to act gratuitously does not abate their obligations and responsibilities, for if they had declined to accept office upon these terms, the company would have adopted some other arrangement for having its interests properly attended to (*a*). When the company is incorporated by special act or crown charter, the duties of the directors or other managers become still more onerous, for they then partake of the nature of those with which public officials are charged. The consequences of these principles are as follows:

Directors cannot benefit by company contracts.

1. Directors being trustees for the company can derive no personal benefit from contracts entered into by them on its behalf. Thus, a director who had purchased a ship on his own account, and afterwards sold it at an advance to the company, charging a commission on the sale, was found guilty of a breach of trust (*b*). So, when one of the directors of a railway company was a member of a firm of ironfounders who entered into a contract for the supply of railway chairs to the company, it was found that the contract could not be enforced against the company (*c*). So, where a railway company furnished a director with money to enable him to purchase the concession of another line, and he purchased it from himself, he being the concealed owner, it was found that the transaction could not be enforced against the company, but that they were entitled to adopt it or repudiate it altogether (*d*). So also, where, in acquiring property for the company, the directors made the purchases at a less price than they were empowered to pay by the company, they were compelled to communicate this difference, and were allowed to retain nothing to themselves as a remuneration for services or alleged risks (*e*).

Directors cannot retain advantages

2. Directors being trustees cannot retain for themselves any profits or advantages which they could not have obtained except

(*a*) *Benson* v. *Heathorn*, 1 Y. and Coll. C. C. 326; *York and North Mid. Ra. Co.* v. *Hudson*, 16 Beav. 495; *Hudson* v. *Ib.*, 18 Beav. 70; *Great Luxembourg Ra. Co.* v. *Magnay*, 4 E. Jur. N. S. 839; *Aberdeen Ra. Co.* v. *Blaikie*, 1854, 17 D. H. of L. 20, 1 Macq. 461; *Bank of London* v. *Tyrrell*, 5 E. Jur. N. S. 924.

(*b*) *Benson* v. *Heathorn*, 1 Y. and Coll. C. C. 326.

(*c*) *Aberdeen Ra. Co.* v. *Blaikie*, 1854, 17 D. H. of L. 20, 1 Macq. 461.

(*d*) *Great Luxembourg Ra. Co.* v. *Magnay*, 4 E. Jur. N. S. 839.

(*e*) *Hickens* v. *Congreve*, 1 R. and M. 150; *Faucet* v. *Whitehouse*, *ibid.* 132; *Beck* v. *Kantorowicz*, 3 K. and J. 230; *Society of Practical Knowledge* v. *Abbott*, 2 Beav. 559; *Maxwell* v. *The Port-Tennant Patent Steam Fuel*

gained by their connection with the company.

for their connection with the company, or which, if obtained at all, should have been secured for the company.

Thus, when a quantity of railway shares, on which deposits and calls remained unpaid, were placed at the disposal of the directors, and one director who had great influence succeeded in getting a number of them sold to friends of his own at a considerable advance, and then proposed to retain the balance of the purchase money after accounting to the company for the amount of the unpaid deposits and calls, it was held that he was bound to make the entire amount forthcoming to the company; and his allegations that he was entitled to retain the balance or any part of it as a present or remuneration for his great services to the concern, were entirely disregarded (*a*). So, where the directors of a company which had amalgamated with another, received from the latter considerable sums apparently for bringing about the amalgamation, the money was held *prima facie* to belong to the shareholders of the first company, and ordered to be paid into Court *pendente processu* (*b*). It has been decided in England, that acquisitions of property made by partners for themselves when they ought to have obtained them for the company, will be deemed to vest in the partners as trustees for the concern (*c*). Whether this would be held to be law in Scotland in the case of partners may be questioned; but there can be little doubt that the principle, of which it is the consequence, would be applied in the case of directors making similar acquisitions. The company, however, cannot claim from the directors either the property they have thus acquired, or its beneficial use, without tendering them full repayment of what it actually cost them (*d*).

How directors may be called to account.

In calling directors to account for breaches of duty, it must be borne in mind that they are the servants of the company, and not of the individual shareholders; and therefore, if a shareholder con-

Co., 24 Beav. 495; *ex parte Perrier*, 7 Irish Chan. Rep. 256; *Foss* v. *Harbottle*, 2 Ha. 489; *Ellis* v. *Colman*, 25 Beav. 662. In these cases the transactions complained of were more or less tainted with fraud, however ingeniously it might be attempted to be concealed.

(*a*) *York and North Midland Ra. Co.* v. *Hudson*, 16 Beav. 485.

(*b*) *Gaskell* v. *Chambers*, 26 Beav. 360.

(*c*) *Carter* v. *Horne*, 1 Eq. Ab. 7; *Featherstonehaugh* v. *Fenwick*, 17 Ves. 298; *Clegg* v. *Fishwick*, 1 Mac. and G. 294; *Clements* v. *Hall*, 2 De G. and J. 173; *Alder* v. *Fouracre*, 3 Swanst. 489.

(*d*) *Great Luxembourg Ra. Co.* v. *Magnay*, 4 E. Jur. N. S. 839.

siders himself aggrieved by their misconduct, his proper course is not to proceed against them at his own instance, but to call upon the company to bring them to account, and afterwards to obtain relief from the company itself (*a*).

It may be noticed in this place, that directors are entitled to no remuneration for their services in the absence of a special agreement or provision to that effect (*b*). Remuneration.

(*a*) *Orr and Others* v. *Glasgow, Airdrie, and Monklands Ra. Co.*, 1857, 20 D. 327; aff. 1860, 22 D. House of Lords 10, 3 Macq. 799, 32 Jur. 486.

(*b*) *Dunstan* v. *Imperial Gas Co.*, 3 B. and Ad. 125.

CHAPTER XII.

POWERS OF PARTNERS, DIRECTORS, AND OTHER OFFICIALS.

HAVING thus reviewed the general principles by which the powers of majorities, of partners, and of directors of companies are regulated, we shall now proceed to consider in detail the more common instances of the exercise of such powers in the course of the company management.

BUYING AND SELLING.

Buying and selling.

It seems never to have been doubted, that every partner of a firm has the *implied* power of purchasing either with the funds or on the credit of the company such goods as are necessary for carrying on the business. In an old case the Court held this to be so clearly fixed, that they found a partnership liable for goods bought by a partner, although the seller did not know of the partnership, and the other partner had settled with his copartner for them (*a*). And similar decisions have frequently been given in England (*b*). Nor is it necessary that a stranger who sells to a single partner shall show that the goods are *de facto* applied to partnership purposes, in order to enable him to recover the price against the company. Thus it was held in England, that where a party sold a quantity of bits to one partner of a firm of harness-makers, who pawned them for his own purposes, the seller was entitled to sue both partners for their price (*c*). The goods supplied must be of the kind required by the partnership business; but if this be so, it

(*a*) *Logy* v. *Durham*, 1697, M. 14566. See also *Monach's Trs.*, 1804, M. 14614.

(*b*) *Russell* v. *Roberts*, 4 Nev. and Main. 31; *City of London Gas Company* v. *Nicholls*, 2 Car. and Payne 365.

(*c*) *Bond* v. *Gibson*, 1 Camp. 185.

is of no consequence whether the firm be of a trading description or not (*a*).

From the very nature and object of trading partnerships, it necessarily follows that every partner has the implied power of selling the partnership goods. What limits (if any) are to be set to this implied power, does not appear from any decision or authoritative *dictum* in the law of this country, so far as the writer is aware. In England it was held in one case, that a single partner could even make a valid sale of the company books (*b*). How far this can be taken as the law of Scotland may be doubted. In the absence of any decision, it is also open to question, whether a partner, without the express consent of his fellows, can dispose of the company's stock, by means of which alone its business could be carried on. This would in effect amount in some cases to a total dissolution of the concern; and anything leading to such a result could hardly be considered as falling under implied powers, which, as we have already seen, mean authority or agency to do what is necessary for carrying on, not terminating the business. Yet in the English case of *Wilson* v. *Miers*, where the directors of a steamship company, whose affairs were in a very unsatisfactory state, had entered into a contract for the sale of its whole shipping, and the purchaser demurred to completing the contract on the ground that general powers to buy and sell did not authorize the directors to sell off the whole of the company vessels without a special resolution to dissolve the concern, it was held by the Court of Common Pleas that the transaction was within the powers of the directors (*c*).

General powers of buying and selling in the course of management do not include the power of amalgamating the company with another; for this would infer a power to buy and sell the company business, with all its liabilities. To carry through such a transaction requires a special resolution of all the partners of an unincorporated company, and in the case of proper corporations can only be effected by the intervention of public authority (*d*).

(*a*) *Gardiner* v. *Childs*, 8 Car. and P. 345; *Wilson* v. *Whitehead*, 10 M. and W. 503; *Athenæum Life Assur. Soc.* v. *Pooley*, 3 De G. and J. 294; *Wood's* case and *Brown's* case, 9 W. R. 366, and 10 W. R. 662.

(*b*) *Dove* v. *Wilkinson*, 2 Stark. 287.

(*c*) 10 C. B. N. S. 348.

(*d*) *Anchor Insur. Co.*, 2 J. and H. 400; *Ernest* v. *Nicholls*, 6 House of Lords Cases 401; *Anglo-Austr. Insur. Co.*, 8 Jur. N. S. 628.

Purchase of real property.

As regards the purchase of real property by a partner or director for the company, this power will be held to be implied where the acquisition is one in the company's line of trade, *e.g.* stances for a building society, or where it may fairly be presumed to be a beneficial purchase, as for instance premises for carrying on the business (*a*). But it is thought one of the public would not be safe in relying on the company's responsibility for extensive purchases of land made by an individual partner, which might involve a diversion of the partnership funds from their legitimate purposes, or which would not likely be an acquisition of any value to the concern.

Sale of real property.

The same principle would seem to regulate the power of selling real property. Unless the nature of the partnership business be such as to render the sale of its real property a thing likely to fall under the scope of the partnership contract (as in the case of building societies), it is probable that the power of selling this kind of property would not be considered as coming under the implied agency; for otherwise the affairs of the company might at any time be thrown into confusion by the sale of its premises by one partner without the knowledge of the others. The circumstance that the property is held in trust by a third party for the firm, or that it is conveyed to the partners *pro indiviso* for that purpose, would not avoid the sale; for if a single partner had the power of transferring the *jus ad rem*, the purchaser could complete the conveyance by adjudication in implement. Nor would the fact that the law requires writing in obligations relative to land affect the question; for if the partner has power to bind the company at all, he has power to sign *socio nomine*. It must, however, be admitted that this question has never, in so far as the author is aware, been judicially determined either in this country, in England, or in America (*b*).

(*a*) *Sorley's Trs.* v. *Grahame*, 1832, 10 S. 319; *York Buildings Co.*, 1779, 2 Paton's App. 541.

(*b*) See, on this subject, Story on Part. 124, and 154-6; and Bisset 45, note. From certain *dicta* in English and American authorities, it might be supposed that partnership realty could in no circumstances be alienated by the act of a single partner (Story, Part. secs. 101 and 119; Bisset 45, n. *e*). Such *dicta*, however, appear merely to mean, that since no partner has implied power to bind his copartners by deed under seal, he cannot convey the legal titles

LEASING.

As in the general case the granting of leases of partnership property does not fall under the ordinary business of a firm, it should seem that such a power is not covered by the *præpositura* of a partner. But if a partnership were formed for the purpose of acquiring houses or other tenements, in order that they might be let to tenants, there seems no reason no doubt that each partner would be held entitled to bind the firm in transactions of this kind.

On the other hand, the acquisition of leasehold property for partnership purposes is not a transaction of such urgency as to require to be entered into without the express concurrence of the company; and accordingly it has been held in England, that one partner has no implied authority to contract for a lease of premises in behalf of the firm (*a*).

BORROWING.

It is worthy of remark, that there is a very material difference between a power to borrow money on the company's credit, and a mere authority to incur company debts by ordering work or goods on its behalf. In the latter case the transaction is generally carried on more openly, and produces something tangible; in the former, a partner may easily abuse his powers by incurring unnecessary obligations, or may even defraud his copartners by applying the proceeds of the loan to his own purposes. Still it is obvious, that unless partners of trading companies possessed the power of borrowing money, it would often happen that the exigencies of commerce could not be met, and the common undertaking would be involved in ruin. The rule accordingly seems to be, that this power will

in company real estate without the concurrence of his copartners. But it must be observed that, in the ordinary case, a valid agreement to sell land may be made by writing, though not under seal, and that a court of equity will often enforce this by a decree for specific performance, which, if the vendor refuse to obey, the Court will make an order vesting the estate in the vendee *de plano*. Now, whether a court of equity would, in the case of a partner entering into an agreement of this kind, decree specific performance, is the real question; and it has never, in so far as we are aware, been determined.

(*a*) *Sharp* v. *Milligan*, 22 Beav. 606.

be held to be implied, wherever its exercise is necessary for the transaction of the partnership business in the ordinary way (*a*).

Knowledge by lender of prohibition.

It must be observed, however, that the power to borrow is merely implied from the circumstances of the case; and is not to be inferred where its exercise is neither ordinary, in the line of trade, nor justified by necessity. If, therefore, the creditor knows, or ought to have known, that the loan was intended not for partnership but for private purposes, he will have no recourse against the company (*b*). So also, *a fortiori*, where borrowing is prohibited by the constitution of the partnership, and the lender is aware of this prohibition (*c*). Even where the lender is not aware of any direct prohibition, and where the purpose appears reasonable, he is not entitled to infer that this power is implied, when the business is of a kind usually carried on on ready money principles (*d*). Increasing partnership capital is not an act within the scope of ordinary business, and therefore the company is not bound by loans contracted in their name by a partner for such a purpose (*e*).

Ratification.

Ratification by all the partners will always validate such transactions, however *ultra vires* or irregular they may have been (*f*). But it must be observed, that in the absence of power to borrow, either express or implied, and in default of ratification, the mere circumstance of the proceeds of the loan having been applied *in rem versam* of the partnership will not of itself validate the transaction, unless the case amounts to one of adoption (*g*).

Public companies.

Where the articles of association of a common law company

(*a*) *Dewar* v. *Millar*, 1766, M. 14569; *Glass* v. *Hutton*, 16 Jan. 1794, F. C., M. 2587; *Selkrig* v. *Dunlop*, 1804, Hume 277; *Turnbull* v. *M'Kie*, 1822, 1 S. 331; *Anderston*, 1828, 6 S. 928; *Blair Iron Co.*, 1855, 18 D. 49, House of Lords Cases, and 27 Jur. 614; *Bothwell* v. *Humphries*, 1 Esp. 406; *Lloyd* v. *Frenchfield*, 2 Car. and Pa. 333. See Shaw's Bell's Com. 217; Lindley 213; Coll. 268.

(*b*) *Johnston* v. *Phillips*, 1822, 1 S. App. 244; *Blair* v. *Bryson*, 1835, 13 S. 901; *M'Leod* v. *Tosh*, 1836, 14 S. 1058.

(*c*) *Worcester Corn Ex. Co.*, 3 De G. M. and G. 180.

(*d*) *Hawtayne* v. *Bourne*, 7 M. and W. 595; *Ricketts* v. *Bennet*, 4 C. B. 686; *Arden* v. *Sharp*, 2 Esp. 524, 3 Ross L. C. 505.

(*e*) *Fisher* v. *Taylor*, 2 Ha. 218; *Greenslade* v. *Dower*, 7 B. and C. 655. See *Bryon* v. *Metro. Saloon Omnibus Co.*, 4 E. Jur. N. S. 680.

(*f*) *Pare* v. *Clegg*, 29 Beav. 580; *Athenæum Insurance Company* v. *Porley*, 3 De G. and J. 294; *Galway* v. *Matthews*, 10 East. 264, 3 Ross L. C. 507.

(*g*) *Johnston, Sharp, and Co.* v. *Phillips*, 1822, 1 S. App. 244; *Burmestro* v. *Norris*, 6 Ex. 796; *Hawtayne* v. *Bourne*, 7 M. and W. 596.

contain no provision to the contrary, the power of borrowing money by the company is implied; and the same principle appears to hold good even in incorporated companies, when the exercise of such a power is necessary for the success of the undertaking, or obviously within the company's line of business (*a*).

When borrowing is not expressly prohibited by the company's constitution, this power may be exercised by a majority of the shareholders even though the company is limited, provided the object of the loan be not to increase capital, but to supply means for the existing wants of the company (*b*).

How power to borrow may be exercised.

When this power is possessed by a company, the question whether and in what manner it may be exercised must be determined by reference to the articles of association or other instrument of constitution; and all provisions and regulations which they contain must in general be adhered to and carried out in their entirety. In the absence of any provisions on the subject, the authority of a general meeting, or at least of a majority of the shareholders, would seem in the ordinary case necessary to the valid exercise of this power. This rule, however, will not be rigidly adhered to when money has been borrowed by the directors to meet necessary purposes in the company's line of business, and when it has been *bona fide* applied accordingly. Thus, when directors had without authority borrowed and applied money in constructing works necessary for carrying on the company business, they were found entitled to reimbursement from the shareholders (*c*). And the power of borrowing money has been deemed so necessary for carrying on the business of a banking company, that the exercise of this power by directors has been held to bind the company, even though they have not complied with all the provisions of the deed of constitution (*d*). But where directors have borrowed money without authority, and have applied it for purposes not within

(*a*) *Royal British Bank* v. *Turquand*, 5 Ell. and Bl. 248; *Bank of Australasia*, 12 E. Jur. 189 and 407; *Morgan's* case, 1 Hall and T. 320; *Norwich Yarn Co.*, 22 Beav. 143; *Bryon* v. *Metropolitan Saloon Omnibus Co.*, 4 E. Jur. N. S. 1262.

(*b*) *Bryon* v. *Metropolitan Saloon Omnibus Co.*, *supra*; *Australian Aux. Steam Clipper Co.*, 4 E. Jur. N. S. 1224.

(*c*) *Troup's* case, 29 Beav. 353; *Pare* v. *Clegg*, 29 Beav. 589; *Hoare's* case, 30 Beav. 225.

(*d*) *Royal British Bank* v. *Turquand*, 5 Ell. and Bl. 248, 6 *ibid.* 327; *Agar* v. *Athenæum Assur. Society*, 3 C. B.

the prescribed sphere of the undertaking, they have no claim of reimbursement against the shareholders (*a*). Two companies A and B were amalgamated by a deed which was afterwards found to be null and void as *ultra vires* and illegal. Before the amalgamation, company A had become indebted to a third party; and after the amalgamation, the directors of the company B granted him a bill drawn by them upon their cashier for the amount of the debt due by company A. It was held that company B was not liable, seeing the bill was not drawn for the legitimate purposes of the company (*b*).

What if directors are specially prohibited from borrowing?

Where directors are specially prohibited from borrowing money, or from borrowing it in a particular manner, acts done by them in contravention of these provisions will not in general bind the company, as the lenders will be held bound to acquaint themselves with the contents of the company's instrument of formation (*c*). But this rule will not be interpreted in a judaical manner; so, when directors were prohibited from granting bills, but had authority to borrow on mortgage, and having notwithstanding granted bills to secure an existing debt, and at the same time executed a mortgage under the seal of the company, which was made subject to redemption on payment of the bills, it was held that the mortgage was valid, as it must be taken as intended to secure the debt, and not to pay the bills (*d*).

The existence of the power to borrow does not authorize either the directors or the company to issue debentures for any other purpose than in security of cash advances (*e*).

Informalities.

Whatever irregularities or informalities there may have been in originating or carrying through the loan by the directors, these may all be remedied by ratification,—particularly if the company has had the benefit thereof,—provided always that borrowing has not been prohibited by charter or special act (*f*).

N. S. 725; *Bank of Australasia*, 12 E. Jur. 189; *Maclae* v. *Sutherland*, 3 Ell. and Bl. 1.

(*a*) *Kent Benefit Building Soc.*, 1 Dr. and Sm. 417. See also *London and County Assur. Co., ex parte Wood*, and *ex parte Brown*, 30 L. J. Ch. 373; *Selwyn* v. *Harrison*, 2 Johns. and H. 334.

(*b*) *Balfour* v. *Ernest*, 5 E. Jur. N. S. 439, 5 C. B. N. S. 601.

(*c*) See *Balfour* v. *Ernest*, *supra*; *Eastwood* v. *Bain*, 3 H. and N. 738.

(*d*) *Scott* v. *Colburn*, 26 Beav. 276.

(*e*) *West Cornwall Railway Co.* v. *Mowatt*, 12 E. Jur. 407.

(*f*) *Phœnix Life Insur. Co.*, 2 J. and

What if company receive the benefit of the loan?

It does not, however, follow, that because the company has had the benefit of money borrowed by one of its partners or by its directors, the lender shall have recourse against the company *ipso jure*. The real question in such cases is, whether the loan was or was not made to the company. The fact that it received the benefit of the proceeds is certainly strong, but not conclusive, evidence of its being a party to the contract; for the lender may have dealt with the partner or the directors on their own credit solely, and the partners or the directors may have gone into the transaction in order to enable them to pay a debt due by them to the company, or to enter into a transaction with it on their own account. The *onus*, therefore, of proving that the loan was made to the company rests on the lender (*a*).

Irregular debentures. Effects of notice.

Strangers cannot enforce irregular debentures as valid, if they have accepted of them with notice that the conditions precedent to their issue had not been fulfilled; and shareholders who accepted of such debentures, after being present at the meeting where their irregular issue was sanctioned, and thus in the knowledge of the irregularity, cannot enforce payment of their contents. Even *bona fide* transferrees for value from such shareholders appear to be in no better position (*b*).

Want of notice.

Bona fide purchasers of debentures are not, however, affected by their invalidity if they received no notice, and were encouraged by the company in the belief that they were valid (*c*). Yet where debentures have been issued in fraud of the company, a purchaser is held in England to be subject to all the equities attaching to them, even though he received no notice; nor does it make any difference that the transfers have been duly registered and that interest has been paid on them to the purchaser, provided these facts have not been communicated to the shareholders (*d*).

H. 441; *Magdalena Steam Nav. Co.*, 1 Johns. 690; *Pare* v. *Clegg*, 29 Beav. 589; *Wood's Claim* and *Brown's Claim*, 9 W. R. 366, and 10 W. R. 662.

(*a*) See *Emly* v. *Lye*, 15 East 7, 3 Ross L. C. 552; *Beckham* v. *Drake*, 9 M. and W. 99; *Bevan* v. *Lewis*, 1 Sim. 376; *Smith* v. *Craven*, 1 Cr. and J. 500; *Worcester Corn Ex. Co.*, 3 De G. M. and G. 180; *Hawtayne* v. *Bourne*, 7 M. and W. 595; *ex parte Chippendale*, 4 De G. M. and G. 19; *Homersham* v. *Wolverhampton Waterworks Co.*, 6 Ex. 142, *per* Parke, B.

(*b*) *Magdalena Steam Nav. Co.*, 1 Johns. 690, 8 W. R. 329, 2 J. and H. 306.

(*c*) *South Essex Gas Light and Coke Co.*, 31 L. J. Ch. 293, 2 J. and H. 306.

(*d*) *Athenæum Life Assur. Soc.* v. *Pooley*, 5 E Jur. N. S. 129.

PLEDGING.

The power of borrowing seems to infer that of impignorating the partnership property for the advances required. In England, it appears never to have been doubted that pledging of the company chattels fell under the partners' implied agency (*a*); and the same would seem to be law in this country, though, from the contract of pledge being less extensively used with us than in England, examples of its operation are less common. It has been said by the Court, that one authorized to sell can effectually pledge the goods of his constituent (*b*).

MORTGAGING.

A more difficult question presents itself, when it is asked whether the granting of a heritable security over the company's real property falls within the implied agency of an individual partner. The point does not seem ever to have come up for judicial determination in Scotland.

English law.

According to the law of England, one partner cannot mortgage the real property of the firm (*c*). But the value of this rule as a precedent throwing light upon the law of Scotland depends on whether it is to be considered as founded simply on the technical rule of the common law, that one partner cannot bind another by deed under seal; or whether it is in part at least founded on considerations of public policy, *e.g.* the danger of one partner giving a favourite creditor an undue preference over the company property. Now, in Scotland the granting of security over the company's heritable property is not attended by any technical difficulties, such as those presented by the English mortgage; and as cases may often occur where the absence of this implied power would be ruinous to the partnership (as when one of two partners is abroad, and an immediate advance of money is required),

(*a*) *Raba* v. *Ryland*, 1 Gow 132; *ex parte Bonbonus*, 8 Ves. 540, 3 Ross L. C.; Lindley 229; 2 Bell's Com. 618.

(*b*) See *Colquhoun* v. *Finlay Duff and Co.*, 1816, 19 F. C. 208, and 1 Bell's Com. 484, and cases there referred to. See also *Attwood* v. *Kinnears*, 1832, 10 S. 817.

(*c*) See *Harrison* v. *Jackson*, 7 Term. Rep. 203, *dictum* of Lord Kenyon, 206, 3 Ross L. C. 557; Lindley 229.

it may well be questioned whether such a power does not exist where the emergency calls for its exercise.

That the English rule is founded in mere technical reasons, seems to be indicated by the fact that one partner has power to mortgage ships belonging to the company (*a*); and that an equitable mortgage, which does not require to be by deed, is held, it would seem, to be within the implied agency (*b*).

Provisions of Act 1845.

The provisions of the Companies Clauses (Scotland) Act, 1845, with respect to borrowing of money by the company, are as follows :—

Mode of exercising the power.

If the company be authorized by their special act to borrow on mortgage or bond, they may borrow in this manner such sums not exceeding the sum prescribed by their special act as shall from time to time be authorized by order of a general meeting. They may even mortgage the undertaking itself, as well as the future calls on the shareholders (sec. 40). On the original debt being paid off, the company may again borrow as before, and so on from time to time as may be required; but unless this power of re-borrowing be exercised in order to pay off an existing debt, it requires the authority of a general meeting. That is to say, while the directors may make such arrangements as they see proper with reference to a loan already existing, they can do nothing towards creating a new debt without the authority of a general meeting (sec. 41). Where it forms a condition precedent to the exercise of the power of borrowing, that a certain amount of the capital shall have been subscribed or paid up, or that the authority of a general meeting shall have been obtained, the certificate of a sheriff that the prescribed amount of capital has been subscribed or paid, and a copy of the order of a general meeting to effect the loan, are declared to be sufficient evidence that the foresaid conditions precedent have been implemented. The sheriff is required to grant the certificate on production to him of the company's books, and of such other evidence as he may think sufficient (sec. 42). The mortgages or bonds granted by the company must be by deed under the company seal, duly stamped and bearing the consideration truly stated. They may be in the forms

(*a*) *Australia Steam Clipper Co.*, 4 K. and J. 733; *ex parte Howden*, 2 M. D. and D. 574.

(*b*) See *ex parte Lloyd*, 1 Mont. and Ayr. 494. See Lindley 229.

of Schedules C or D annexed to the Act, or to the like effect; and they have the full effect of assignations in security duly completed (sec. 43). The mortgagees are respectively entitled to rank *pari passu* with each other in their proportional shares of the tolls, sums, and powers contained in the mortgages, and of the calls on the shareholders, if these also have been mortgaged, both as regards principal and interest, without any preference by reason of priority of the date of a mortgage, or of the meeting at which it was authorized (sec. 44). No mortgage, unless the contrary is expressly provided, precludes the company from receiving and applying to company purposes any calls thereafter made (sec. 45). All mortgages and money lent to the company are declared to be personal and not real estate (sec. 46). Bondholders, like mortgagees, rank *pari passu* without preference by reason of the dates of their bonds or of the meetings at which they are authorized, or otherwise (*a*) (sec. 47). A register of mortgages and bonds must be kept by the secretary; and within fourteen days after the date of each mortgage or bond, an entry or memorial specifying the number and date of the deed and the sums secured thereby, together with the names and additions of the parties thereto, must be made in this register. The register may at all reasonable times be perused gratuitously by any shareholder, mortgagee, or bond creditor of the company, or any person interested in a company bond or mortgage (sec. 48). Mortgagees or bondholders may transfer their rights at any time. The transfer must be by deed duly stamped, stating the actual consideration; and it may be either in the form of Schedule E annexed to the Act, or to the like effect (sec. 49). Within thirty days after the date of any such transfer, or within thirty days after its arrival in the United Kingdom, it must be produced to the secretary, who causes an entry or memorial of it to be made in the same way as in the case of the original mortgage. The transferree thereupon becomes entitled to the full benefit of the mortgage or bond, and the transferrer becomes incapable of affecting the right by release, formal discharge, or otherwise. A small fee may be demanded by the company for the entry; and until such entry is

Register of mortgages, etc.

(*a*) This provision cannot be defeated by the device of giving one debenture-holder an additional mortgage. *De Winton* v. *Brecon, etc.*, 26 Beav. 533; *Legg* v. *Mathieson*, 2 Giff. 71, and 6 E. Jur. N. S. 1010.

made, the company is not responsible to the transferree in respect of the mortgage (sec. 50).

Payment of interest.

The interest on the borrowed money is payable half-yearly, unless otherwise provided in the bond or mortgage, and in preference to dividends (sec. 51). The interest can only be transferred by deed duly stamped (sec. 52).

Time for paying up bonds.

The company may, if they think fit, fix a period for repayment of the principal and the interest of the money borrowed, and in that case they must insert it in the mortgage deed or bond. At the expiration of this term the principal and all arrears of interest become payable to the creditor, at the company's principal office or place of business, if no other place of payment be inserted in the deed (sec. 53). If no term is fixed for repayment, the creditor may demand the principal and the arrears of interest at or subsequent to the expiration of twelve calendar months from the date of the deed, upon giving six months' previous notice to that effect; and in like manner, the company may at any time pay off the same on giving the like notice. The notice may be in writing or print, or in both; and if given by the creditor, must be delivered to the secretary, or left at the principal office of the company; and if given by the company, it must be given either personally to the creditor or left at his residence. If the creditor be unknown to the directors, or cannot be found after diligent inquiry, the notice may be given by advertisement in the *Edinburgh Gazette*, and in the prescribed newspaper; and if none be prescribed, or if the prescribed newspaper cease to be published, in a newspaper circulating in the district where the company's principal place of business is situated (secs. 54 and 140). On expiration of notice to pay off the debt duly given, interest ceases to run, unless on demand the company fail to make payment of the principal and interest (sec. 55).

Books of account.

The books of account of the company must be open to the inspection of the mortgagees and bond creditors, with liberty to take extracts free of any charge (sec. 58).

Conversion of loan into capital.

The company have the option (unless it be otherwise provided in the special act) of raising the sums authorized to be borrowed, or any part of them, by the creation of additional shares. This, however, can only be done when the authority of a general meeting has been previously obtained (sec. 59). The shares so created are

to be considered in all respects the same as original shares, with respect to payment of calls and forfeitures, except only as to the times of making calls and their amount, which may be fixed as the company from time to time see fit (sec. 60). If the existing shares are at a premium or above *par*, the new shares must (unless otherwise prescribed) be of such an amount as will allow them to be conveniently apportioned among the existing shareholders in proportion to the shares held by them respectively; and it is provided that they shall have the offer of them in the first instance, which offer must be by letter, under the hand of the secretary, addressed to each shareholder, or left at his usual or last place of abode (sec. 61). These new shares vest in the shareholders accepting them, and paying the value thereof at the time and by the instalments fixed by the company. But if a shareholder fails for a month to accept and pay as above, the shares tendered him may be disposed of by the company as they see fit (sec. 62). If the old shares be not at a premium, the new shares may be of such an amount, and may be issued in such manner and on such terms, as the company choose (sec. 63).

Act 1862. The provisions of the Act of 1862, as to borrowing, are similar to those we have just been considering. By sec. 43, it is provided that every limited company must keep a register of all mortgages and charges specifically affecting the property of the company, and must enter in such register a short description of the property affected by each mortgage or charge, the amount of charge created, and the names of the creditors or mortgagees. If any company property is mortgaged or charged without this entry being made, every director or other official who knowingly and wilfully permits it to be done, incurs a penalty of not more than £50. The register of mortgages and charges must be made patent to creditors under heavy progressive penalties.

The articles of association ought to contain provisions and regulations as to the mode in which the power of borrowing is to be exercised; but their silence on this subject will not prevent the exercise of the power, if it is plainly necessary for the purposes of the society as appearing in the memorandum of association (*a*). This power, however, should, in the absence of a provision to the

(*a*) See *Bryon* v. *Metropolitan Saloon Omnibus Co.* (*Limited*), 4 E. Jur. N. S. 680, 1262.

contrary, be exercised by a resolution of the shareholders in general meeting. Yet where, by the articles of association, the directors were empowered to exercise all powers which the company might exercise in general meeting, it was held that the power of borrowing was covered by this general provision (*a*).

Act of 1863.

The Companies Clauses Act, 1863 (*b*), gives further facilities for raising additional funds by the issue of new ordinary or preferential shares. Its provisions are as follows:—When a company, incorporated either before or after the passing of the Act of 1863, is authorized by a special act passed after that date to raise additional sums by the issue of new ordinary shares or of new ordinary stock, or (at the option of the company) by either of these modes, the company may, with the sanction of the prescribed proportion of the votes of members present personally or by proxy, at a meeting specially convened for the purpose in terms of the special act, and (if no proportion is prescribed) with the sanction of three-fifths of such votes, raise the additional sums by creating and issuing from time to time new ordinary shares or stock, as the case may be, of such an amount and subject to such provisions as to calls as they may see fit (sec. 12).

New ordinary shares and stock.

New privileged shares and stock.

In like manner, the company, when so empowered, may raise such additional sums by creating and issuing from time to time, with the like sanction, such new shares or new stock, either ordinary or preferential, and either of one class with like privileges, or of several classes with different privileges, and of the same or of different amounts, and respectively with any fixed, fluctuating, contingent, preferential, perpetual, terminable, deferred, or other dividend or interest, not exceeding the rate prescribed, and otherwise not exceeding the rate of 5 per cent. per annum, as they may, acting within their prescribed power, see fit, and subject to such provisions as to amount of calls and times of payment as they may deem proper. Such new issue must not, however, affect the rights of holders of preference shares or stock already existing (sec. 13). The preference shares or stock so issued are entitled to a preference over the ordinary shares or stock, in so far only as the profits of each year are concerned; and if in any year ending on the prescribed day, or otherwise on the 31st of December, there are no

(*a*) *Australian Aux. Steam Co.*, 4 E. Jur. N. S. 1224.
(*b*) 26 and 27 Vict. c. 118.

profits available for payment of the full amount of preferential dividend or interest in that year, the deficiency cannot be made good out of the profits of any subsequent year, or out of the company funds (sec. 14). The terms and conditions to which any preference share or stock is subject must be clearly stated in the certificate of such preference share or portion of preference stock (sec. 15).

Regulations as to manner of issue.

Unissued new shares or stock may be cancelled if the company see fit (sec. 16). If, when new shares or stock are issued, the ordinary shares or stock are at a premium, then, unless the company determine otherwise, the new shares or stock must be of such amount as will conveniently allow them to be apportioned among the existing shareholders of ordinary shares or stock in proportion as nearly as may be to such ordinary shares or stock as they then respectively hold, and the same must be offered to them *at par* in that proportion. The company, however, is not required to apportion or offer the new stock in this manner unless the amount of every new share or portion of stock would, if so apportioned, be at least the sum prescribed, or otherwise ten pounds (sec. 17). The offer must be made by letter under the hand of the treasurer or secretary, delivered to every share or stock holder, or sent by post addressed to him according to his address in the share or stock holders' address book, or left for him at his usual or then last known place of abode in England, Scotland, or Ireland, as the case may be. All offers made by post are considered as made on the day when the letter should be delivered in the usual course of post (sec. 18). The new shares or stock vest in the share or stock holders or their nominees by acceptance (sec. 19). If, for the prescribed time, or otherwise for one month after offer, the share or stock holders fail to signify their acceptance in whole or part, they are deemed to have declined, and the new shares or stock may be disposed of by the company either in whole or part, as the case may be. Yet, on cause shown to the satisfaction of the directors, the time for acceptance may in special cases be enlarged (sec. 20). In all other cases than those above mentioned, the directors may from time to time dispose of new shares and stock to such persons and on such conditions as they deem advantageous to the company, provided only that the new shares or stock are not disposed of for less than their full nominal amount (sec. 21).

Debenture stock.

Where any company, incorporated either before or after the passing of the Companies Clauses Act of 1863, is authorized by any special act subsequently passed and incorporating Part III. of the Act of 1863 to create and issue debenture stock, the company may, with the same sanction as that just specified in the case of issuing new shares, create and issue debenture stock in such amounts and manner, on such terms and conditions, and with such rights and privileges as may be deemed proper, instead of and to the same amount as the whole or any part of the money for the time being owing by the company on mortgage or bond, or which they have power to raise by mortgage or bond, and may attach to the stock so created such fixed and perpetual preferential interest not exceeding the prescribed rate, and otherwise not exceeding four per cent. per annum, as is thought fit. The interest may be made payable half-yearly or otherwise, and may be made to commence at once or at any future time or times as the debenture stock is issued (sec. 22). This debenture stock and the interest thereon is a charge on the undertaking of the company prior to all other shares or stock; but in other respects it is transmissible and transferable in the same manner and under the same provisions and regulations as the other company stock. It is personal estate (sec. 23). The holders of debenture stock have no preference among themselves; but the interest accruing thereon has a preference over all dividends and interest on other company stock or shares, whether ordinary, preference, or guaranteed, and ranks next to the interest payable on mortgages or bonds granted before the creation of the debenture stock (sec. 24).

Judicial factor.

If the interest on this debenture stock is not paid within thirty days after it becomes payable, any one or more debenture-holders, holding individually or collectively the sum in nominal amount prescribed, and if none prescribed, then a sum equal to a tenth of the aggregate amount which the company is for the time being authorized to raise by mortgage, bond, or debenture stock, or the sum of £10,000 sterling, whichever of the two last-mentioned sums is the smallest, may (without prejudice to the right to sue for the interest in arrear) require the appointment of a judicial factor (sec. 25). This application is made to the Court of Session, who, after hearing parties, may, if they see fit, make the appointment. The judicial

factor, on being appointed, receives all the tolls or sums liable for the interest until the arrears then due on the debenture stock, with all costs and charges, are paid; and distributes the same rateably and without priority among all the debenture-holders whose interest is in arrear, after applying a sufficient part thereof towards extinction of the interest on the mortgages or bonds, if any, according to their priorities. As soon as the full amount of interest and costs has been paid, the powers of the judicial factor cease, and he is bound to account to the company for his intromissions, and to pay over to them any balance in his hands (sec. 26).

Ordinary action.

Without prejudice to his power to apply for a judicial factor, any debenture-holder may recover the arrears of his interest by action against the company (sec. 27).

General rules as to debenture stock.

The debenture stock must be entered in a register kept for that purpose, with the names and addresses of the holders, and the respective amounts to which they are entitled. This register is accessible to any mortgagee, bond-holder, holder of debenture stock or shares, and to any shareholder, free of charge (sec. 28). Debenture-holders are entitled to certificates from the company, stating the amount of the debenture stock held by them. These certificates are framed in conformity to the regulations as to certificates of shares in force for the time being, *mutatis mutandis* (sec. 29). Existing mortgages or bonds are not affected as to priorities, rights, and privileges, by the issue of debenture stock (sec. 30). Money raised by debenture stock must be applied exclusively either in payment of existing mortgages or bonds, or else for the purposes to which it would be applicable if it were raised on mortgage or bond (sec. 32). Separate accounts must be kept by the company, so as to distinguish money borrowed on debenture stock from that raised by mortgage or bond, and to show how much money raised in the latter form has been paid off by the former (sec. 33). Whatever powers of borrowing and re-borrowing may be possessed by the company are extinguished, in so far as they are exercised by the issue of debenture stock (sec. 34). The holders of debenture stock are in the same position as mortgagees, and are not, in virtue of their debentures, entitled to be present or vote at meetings like other stockholders (sec. 31). The provisions of the Act as to debenture stock are declared to apply to mortgage preference stock, and funded debt, as the case may be, in

all respects as if these latter phrases occurred whenever the former is used (sec. 35).

BILLS AND NOTES.

General rule.

These documents are of such general use in mercantile transactions, that it has been long settled that any partner of a *trading* firm has implied power to draw, accept, grant, or indorse bills and notes in the company name (*a*).

Does not apply to firms other than trading.

But it is very doubtful whether this rule applies to firms that are not properly mercantile or trading. According to the English authorities, it seems that the power of granting and accepting such documents is not presumed where its existence is not necessary or usual in carrying on the particular business in which the company is engaged (*b*). And it has accordingly been held not to exist in companies of solicitors (*c*), farmers (*d*), quarriers (*e*), and the like, where no usage or necessity to support its exercise could be shown (*f*).

Nor without line of business.

For a similar reason, this power will not be held to exist in relation to matters plainly without the line of business pursued by the firm (*g*).

What if exercise of this power is prohibited?

Whenever, again, it can be made to appear that the creditor knew the bill was granted for a private and not for a company debt, it will not be effectual against the company (*h*), even though the company have been benefited by the transaction (*i*); and the

(*a*) 2 Bell's Com. 615. *Selkrig* v. *Dunlop*, 1804, Hume 277; *Turnbull* v. *M'Kie*, 1822, 1 S. 331; *Anderston, Vict. So.*, 1828, 6 S. 928; *Blair Iron Co.*, 1855, House of Lords, 18 D. 49, 27 Jur. 614; *Gordon* v. *Sutherland*, 1761, M. 14677; *Naughton* v. *Ritchie*, M. 1490; *Dewar* v. *Miller*, 1766, M. 14569; *Smith* v. *Jarves*, Lord Raymond 1484; *Lane* v. *Williams*, 2 Vern. 277.

(*b*) *Dickinson* v. *Valpy*, 10 B. and C. 128, 3 Ross L. C. 561. Chitty on Bills, p. 35.

(*c*) *Hedley* v. *Bainbridge*, 3 Q. B. 316.

(*d*) *Greenslade* v. *Dower*, 7 B. and C. 635.

(*e*) *Thicknesse* v. *Bromilow*, 2 Cr. and J. 425.

(*f*) See, on this subject, *Proudfoot* v. *Lindsay*, 1825, 3 S. 310. Story on Part. s. 102*a*, and ss. 126-7; Coll. 269; Lind. 214; Bisset 67.

(*g*) *Kennedy*, 1814, 18 F. C. 122. Here the bill bore to be for value in soda, but the company did not trade in such wares. Compare *Turnbull* v. *M'Kie*, 1822, 1 S. 331; *Stein* v. *Calder*, 1794, 1 Bell's Com. 402, n. 8.

(*h*) *Miller* v. *Douglas*, 1811, 16 F. C. 154; *Mattheson* v. *Fraser*, 1820, Hume 758; *Blair* v. *Bryson*, 1835, 13 S. 901.

(*i*) *Johnston and Co.*, House of Lords, 1822, 1 S. App. 244.

company will not be bound by the signature of a partner *socio nomine* when he was prohibited from accepting for the company, and the creditor had notice of this restriction (*a*). But if the creditor had no notice that a restriction of this kind existed, and if the nature of the company business implied the power of drawing bills, the company will be bound (*b*). If, however, it be proved that the bill was issued by a partner in fraud of his fellows, it has been held in England that the holder will have to show that he gave value (*c*). This rule is extremely equitable, and there seems no reason to doubt that it is law in Scotland (*d*). In one case a firm consisted of two partners, viz. Charles Archer and Son, who were also partners of the Perth Foundry Company, which consisted of four partners. The first firm were indebted by promissory-note to one Proudfoot for £1000; and having fallen into difficulties, they prevailed on the manager to concur with them in granting a promissory-note for the same amount, in name of the Foundry Company, in consideration of which Proudfoot cancelled his note by the firm of Charles Archer and Son. This was done without the knowledge of the other partner of the Foundry Company, which was afterwards sequestrated. Proudfoot claimed on the note, but his claim was rejected on the ground that the note was *ultra vires* of even a majority to grant (*e*). *E converso*, a partner of a bank, who discounted a bill as an individual, was held not to be identified with the agent of the bank of which he was a partner, so as to subject him to exceptions pleadable against the bank agent, and so prevent his recovering on the bill (*f*).

Directors, etc.

Directors, managers, and other officials of public companies, stand in a somewhat different position from partners in a private firm as to the power of binding their companies by bills and notes. According to the old common law of England, corporations could

(*a*) *Galway* v. *Matthew*, 10 East 263, 3 Ross L. C. 507; *Willis* v. *Dyson*, 1 Stark. 164; *Vice* v. *Fleming*, 1 Yo. and Jer. 227. See *M'Leod* v. *Tosh*, 1836, 14 S. 1058. Here the company was dissolved, and the creditor knew that the partner who signed was only empowered to wind up the concern.

(*b*) *Per* Lord Chancellor, *ex parte Bonbonus*, 8 Ves. 542.

(*c*) *Grant* v. *Hawkes*, Chitty 32, No. 9.

(*d*) See, however, Wilson's Thomson on Bills, p. 159.

(*e*) *Proudfoot* v. *Lindsay*, 1825, 3 S. 310.

(*f*) *Downes* v. *M'Fie and Co.*, 1829, 8 S. 246.

contract only by deed under the corporate seal. Hence their office-bearers were held to have no power to bind them by negotiable documents (*a*). The tendency, however, in modern times has been towards a relaxation of this rule in incorporated mercantile companies, where the interests of commerce seemed to require it; and this is particularly to be observed in the American branch of English law (*b*). In Scotland, the rule requiring contracts by corporations to be under seal has not, at least in modern times, been much insisted in; but agreements or obligations by such associations have been held valid when subscribed by their office-bearers for the time being (*c*). Hence in this country the question whether an incorporated company can be bound by bills or notes signed by its directors or officials, does not seem to have been complicated by the same technical difficulties as in England. As regards unincorporated joint-stock companies managed by directors or other officials, it has more than once been decided in England, that as these officials are to be considered special agents, they do not bind the company by signing bills or notes, unless this power has been specially conferred; and that even as regards unincorporated associations, the public are bound to make themselves aware of the regulations of the company in this respect (*d*). In Scotland, the tendency would seem to be to hold the power as implied both in corporate and unincorporate associations, whenever its exercise is plainly necessary for the management of the company business, though the articles of association or even the incorporating instrument do not bear it *per expressum*, so long at least as they contain no regulation to the contrary. And this will hold, *à fortiori*, when the power in question has been exercised practically without objection for a considerable time (*e*). It is even a matter of doubt whether this is not also the drift of the English decisions in modern times (*f*).

(*a*) Chitty on Bills 9.

(*b*) Story on Bills, s. 79; Bayley 78–9.

(*c*) Menzies' Lectures 209.

(*d*) See *Thomson* v. *Un. Salvage Co.*, 1 Ex. 694; *Brown* v. *Byers*, 16 M. and W. 252; *Bramah* v. *Roberts*, 3 Bingham N. C. 963; *Dickinson* v. *Valpy*, 10 B. and C. 128, 3 Ross L. C. 561.

(*e*) See *Swinburne* v. *West. Bank of Scotland*, 1856, 18 D. 1025; *North British Bank* v. *Ayrshire Iron Co.*, 15 D. 782; Wilson's Thomson on Bills 142. But see also *Telford* v. *James*, *etc.*, 1822, as reversed 1824, 2 S. App. 220.

(*f*) See *Gordon* v. *Assur. Co.*, 1 H. and N. 599; *Thompson*, 8 C. B. 849; *Allen*, 9 C. B. 574; *Aggs*, 1 H. and N. 165; *Lindus*, 2 H. and N. 293; *Halford*, 16 Q. B. 442; *Edwards*, 6 Ex. 269. But see also Lindley 215.

Mode of binding the company.

Even when full power is possessed by partners or officials to bind their companies by signing bills and notes, these documents may be signed in such a manner as to bind not the company, but the partner or official alone. To bind the company, the bill or note must purport to be the paper of the company. This may be effected by adhibiting the signature of the firm by which it grants obligations, signing *per procurationem*, or otherwise *ex facie* indicating that it is the obligation of the company (*a*). The company must appear on the document in its proper style. Thus, it has been held in England, that where the style of a firm was 'John Blurton' merely, it was not bound by a bill signed 'John Blurton and Co.' (*b*). If, however, the variation be not essential, the firm is bound. Thus, where the firm was 'Seymour and Ayres,' a note accepted thus, Thomas Seymour and Sarah Ayres, was held to bind the firm (*c*). Trading firms possessing a name containing the names of one or more partners, *e.g.* John Smith and Co., are bound by bills or notes signed for them in this manner (*d*). But when the company uses a descriptive name, such as the 'Blair Iron Company,' the adhibition of this *per se* will not be sufficient; the document ought to be signed *per procurationem* of the partner or official, thus, 'The Blair Iron Company, per Alexander Alison.' Yet it has been held that any form of signature from which it appears that the note is granted by a party entitled to sign for the company in that character, is sufficient to bind the company (*e*). It has sometimes been doubted whether signature by an agent is sufficient to warrant summary diligence against his principal, which in the present case is the company. But such mode of signature would appear to be as valid as any other for this purpose (*f*).

Partners may bind themselves and not the company.

It is to be observed, however, that in order to bind the company, the signature of the agent must be expressly as agent or procurator for the company; if he merely signs his individual name, the company will not be liable, though he himself will remain effec-

(*a*) *Telford* v. *James, etc.*, 1822, as reversed 1824, 2 S. App. 220; *Wixon* v. *Deans*, 1849, 11 D. 1188; *Murray*, 1827, 6 S. 147; *Johnstone* v. *Clifton-hill Co.*, 1852, 15 D. 84.

(*b*) *Kirk* v. *Blurton*, 12 L. J. Ex. 117.

(*c*) *Norton* v. *Seymour*, 3 C. B. 792.

(*d*) *Thomson* v. *Liddell and Co.*, 2 July 1812, 16 F. C. 721; *Wixon* v. *Nicoll*, 1849, 11 D. 1188.

(*e*) *Blair Iron Co.* v. *Alison*, 1855, 18 D. (House of Lords) 49.

(*f*) See *Turnbull* v. *M'Kie*, 1822, 1 S. 353.

tually bound (*a*). And it does not necessarily make any difference in such a case, that the proceeds of the bill or note have been used for company purposes (*b*). Upon this principle, it has been held that a bill accepted by one of a firm of two partners in his individual name does not bind the partnership, that is, the other partner (*c*); and it has even been questioned in Scotland whether a bill accepted by all the partners as individuals, bound the company (*d*). In relation to this matter, it has been settled in England that a bill drawn *per expressum* on the firm, and accepted only by a single partner in his individual name, binds the company (*e*); but that if a partner adhibits his name to a note without promising to pay for the company, he binds only himself, though the note may be granted for a partnership debt (*f*). And this would appear to be the law of Scotland when rightly understood.

But it is held, *e converso*, that a bill drawn on a partner as an individual, and accepted by him for the firm, does not bind the firm, apparently on the principle that to allow this would be to enable a partner to interpose the credit of the firm for his private debts (*g*). And in like manner, a bill drawn on the directors or other officials of a company as individuals, and accepted by them as on behalf of the company, has been found to bind only the individual acceptors, and not the company (*h*). Again, a bill drawn on a company and accepted by its officials or agents, binds the company and not the individual acceptors, except in so far as they may be responsible as members of the concern (*i*). But it has been very justly decided, that persons who sign a promissory-note as the office-bearers of a society which has no existence and therefore cannot be sued, or of which they were not the proper representatives, may themselves be proceeded against individually (*k*). It has been held, that a bill

(*a*) *Telford* v. *James, etc.*, 1822, 1 S. 290, as revd. 1824, 2 Sh. App. 219.

(*b*) *Hogg* v. *Weir*, 1748, Elchies, No. 10, *voce* Society. See *Emly* v. *Lye*, 15 East 7; *ex parte Emly*, 1 Rose 61.

(*c*) *Siffkin* v. *Walker*, 2 Camp. 308. See *Naughton* v. *Ritchie*, 1712, M. 1490.

(*d*) *Johnstone* v. *Cliftonhill Coal Co.*, 1852, 15 D. 84.

(*e*) *Mason* v. *Rumsey*, 1 Camp. 384; *Owen* v. *Van Uster*, 10 C. B. 318; *ex parte Harris*, 1 Madd. 583.

(*f*) *Siffkin* v. *Walker*, 2 Camp. 308; *Murray* v. *Somerville*, 2 Camp. 99, n.

(*g*) *Nicholls* v. *Diamond*, 9 Ex. 154; *Mare* v. *Charles*, 5 E. and B. 978. See *Serrell* v. *Derbyshire Ra. Co.*, 9 C. B. 811.

(*h*) *Bult* v. *Morrell*, 12 A. and E. 745.

(*i*) *Eastwood* v. *Bain*, 3 H. and N. 738; *Cameron Coalbrook Co.*, 6 Ex. 269, and 16 Q. B. 442.

(*k*) *Ross* v. *Young and Others*, 1831, 9 S. 275.

accepted by the secretary of a company 'for the directors' did not bind the company, there being no general authority in the secretary of a company as such to negotiate bills for it (*a*). Bills drawn on a company in the wrong name, and accepted in the proper one, bind the company (*b*). And where a firm has been in the habit of using a name other than its correct or existing appellation, it will be bound by bills or notes bearing such name (*c*). Where two firms have one and the same name, and some of the partners are members of both firms, a *bona fide* onerous holder of a bill bearing the common name, and who has had no notice of what firm was the true debtor, has recourse against all the members of both firms (*d*). And where a firm carries on business in the name of an individual, bills bearing his name will bind both himself and his dormant partners (*e*). It need hardly be observed that single individuals, trading as companies, will be liable for such bills as they accept in the name of the supposed firm (*f*). There is no authority for the proposition, sometimes maintained, that a partner has power to authorize a stranger to indorse bills as agent in the company name, so as to bind the company. Here the maxim applies, *Delegatus non potest delegare* (*g*). Even where a partner went abroad, and gave his copartner a power of attorney to manage his affairs, and to draw, accept, and indorse bills in his name, this was held to have no connection with the right to sign partnership bills (*h*).

English rule, which appears not to be law in Scotland.

It has been held in England, that directors who had no power to render the company liable for bills, had still power by indorsement to transfer the contents thereof, so as to enable the indorsee to sue the acceptor. It may be doubted whether this is the law of Scotland (*i*).

Scotch rule as to incorporated companies.

When, in Scotland, the royal charter or general or special

(*a*) *Neale* v. *Turton*, 4 Bing. 149.

(*b*) *Lloyd* v. *Ashly*, 2 B. and Ad. 23.

(*c*) *Williamson* v. *Johnson*, 1 B. and C. 146.

(*d*) *M'Nair* v. *Fleming*, 1805 and 1807, 2 Bell 670, n. 2, aff. 3 Dow. 229; *Davidson* v. *Robertson*, 1815, as aff. 3 Dow 218; *Baker* v. *Charlton*, Peake 80; *Swan* v. *Steele*, 7 East 210.

(*e*) *South Carolina Bank* v. *Case*, 8 B. and C. 427; *ex parte Law*, 3 Deac. 541.

(*f*) *Booth* v. *Commercial Bank Co.*, 1833, 2 S. 273; and see *Rose* v. *Moore*, 1833, 11 S. 334.

(*g*) The case of *Tennant* v. *Strachan*, 1 M. and Malk. 377, quoted in support of this proposition in Wilson's Thomson on Bills 160, is not in point.

(*h*) *Attwood* v. *Munnings*, 7 B. and C. 278.

(*i*) *Smith* v. *Johnson*, 3 H. and N. 222.

act by which a company is incorporated contains no provision as to the mode in which bills or notes are to be executed on its behalf, such documents, like other obligations, are made binding on the company by the subscription of the proper officials for the time being (*a*). But any provisions or regulations relative to this matter which may be contained in the incorporating instrument ought to be rigidly adhered to, as a deviation from them in essentials may liberate the company.

Companies Act 1862.

The provisions of the Companies Act, 1862, are as follows:— 'A promissory-note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of any company under this Act, if made, accepted, or indorsed in the name of the company or by any person acting under authority of the company, made, accepted, or indorsed by or on behalf or on account of the company, by any person acting under the authority of the company' (sec. 47). It would seem that the party taking the bill or note from the company, is bound to see that it is signed by a person having authority to bind the company in terms of the statute. This authority must have been conferred by resolution, or must be contained in the articles of association. The mere fact of the persons signing being directors is not enough (*b*), unless the duties with which they are charged plainly involve the exercise of this power (*c*).

Companies Act 1845.

The provisions of the Companies Clauses Consolidation (Scotland) Act are as follows:—The directors are empowered to appoint one or more committees of their own number, with power to do any acts which they themselves could lawfully do, and with which they may from time to time think proper to entrust them (sec. 98). And it is declared, that with respect to any contract which, if made between private persons, would be by law required to be by deed or by writing, and signed by the parties charged therewith, the directors or their committee empowered to do so may make such contract on behalf of the company, either under the

(*a*) *Bowie* v. *Wilson*, 1695; *Anderson* v. *Morton*, 1779, M. 2510, and other cases there reported.

(*b*) *Bult* v. *Morrell*, 10 L. J. Q. B. 52; *Bramah* v. *Roberts*, 6 L. J. C. P. 346, and 3 Bing. N. C. 963; *Balfour* v. *Ernest*, 5 E. Jur. N. S. 439; *Lindus* v. *Melrose*, 3 H. and N. 177.

(*c*) *Balfour* v. *Ernest*, *supra*; *Lindus* v. *Melrose*, *supra*. See Wilson's Thomson on Bills 144.

common seal or signed by such committee, or any two of them, or any two of the directors (sec. 100). From this it follows that bills or notes may be signed on behalf of the company by any two of the directors.

BANK CHEQUES.

Bank cheques may be drawn in the name of the firm by an active partner, otherwise the business would often come to a stand. This has been expressly decided in England (*a*). The same would seem to apply to managing officials.

GUARANTEE AND SURETYSHIP.

As it forms no part of the ordinary business of a firm to become surety for the debts or obligations of third parties, a partner is not presumed to have power to bind the firm by contracts of this kind, unless such power is expressly conferred, or plainly implied from the nature of the business, as in the case of guarantee associations (*b*), and companies who buy and sell on *del credere* commissions. After some indications of a contrary doctrine (*c*), this appears to have become settled law in England (*d*); and the same principles seem to be recognised in the law of Scotland, as may be inferred from the cases noted below (*e*). It must be admitted, however, that the question has not yet been raised in its pure form in this part of the kingdom.

Private debts.

It is fixed that a partner cannot pledge the credit of the firm in security of his private debt (*f*); unless, perhaps, where the debt for which the guarantee was granted was plainly in the company's line

(*a*) *Laws* v. *Round*, 4 E. Jur. N. S. 74, C. P.

(*b*) See a case where a bond of caution by a guarantee association was refused, the risk not being within the ordinary business of the company. *Donaldson* v. *Findlay and Co.*, 1860, 22 D. 1471.

(*c*) *Hope* v. *Cust*, 1 East 53; *ex parte Gardom*, 15 Ves. 286.

(*d*) *Hasleham* v. *Young*, 5 Q. B. 833; *Duncan* v. *Lowndes*, 3 Ross Lead. Ca. 475, and 3 Camp. 478; *Crawford* v. *Stirling*, 4 Esp. 207; Story, Part. s. 111; and in particular, *Brettel* v. *Williams*, 4 Exch. 623. See also *Ridley* v. *Taylor*, 13 East 178.

(*e*) *M'Nair and Co.* v. *Gray;* and *Hunter* v. *Speirs*, 1803, Hume 753; *Kennedy*, 1814, 18 F. C. 122; *Donaldson* v. *Findlay and Co.*, 1860, 22 D. 1471.

(*f*) See the preceding cases of *M'Nair* and *Kennedy*.

of business, and the receiver of the guarantee was ignorant of its being a private transaction of the partner's. In such a case, the firm, it is thought, would be bound, but of course with indemnity against the offending member (*a*).

A letter of guarantee by the managing partner of a company for behoof of one of the partners, 'to the extent of the value of the stock which he may have in our house, subject to the liquidation of our debts and engagements,' has been held valid *pro tanto* against the company (*b*).

Homologation.

Of course every guarantee irregularly or improperly granted by partners may be rendered binding by homologation on the part of the company (*c*). And it has been thought that power to guarantee in a particular instance may be safely inferred, where in a previous course of dealing similar guarantees had been given in the partnership name with the privity of all the partners (*d*).

Difference between guaranteeing and accepting bills, etc.

Proper guarantee must, in relation to this question, be distinguished from granting, accepting, or indorsing bills and notes. Thus it has been held in England, that though a partner has no implied power to bind the firm by guaranteeing bills, except by drawing and indorsing them (*e*), a promise made by a partner that the firm will put a party in funds to meet a partnership bill when due, in order to induce him to accept it, is not a guarantee transaction, and will be given effect to (*f*). And it has been held that a letter of guarantee by a managing partner under the company firm, of the bill of a partner to the extent of his share in the stock, was binding on the firm (*g*).

Sole partner.

A person carrying on business under an ostensible firm, of which he is the sole partner, binds himself by a guarantee in the company name (*h*).

Directors, etc.

Directors, managers, and other officials of joint-stock companies, being special agents, their powers to bind the company cannot be

(*a*) See Sh. Bell's Com. 219.

(*b*) *Buchanan* v. *Dennistoun*, 1835, 13 S. 841.

(*c*) *Robertson and Co.* v. *Galloway and Reid*, 1821, 1 S. 196; *Sandilands* v. *Marsh*, 2 B. and A. 673; *Buchanan* v. *Dennistoun and Co.*, 1831, 9 S. 557; *Paterson* v. *Calder*, 1808, 14 F. C. 235.

(*d*) *Per* Lord Ellenborough in *Duncan* v. *Lowndes*, 3 Camp. 478.

(*e*) *Duncan* v. *Lowndes*, *supra*.

(*f*) *Johnson* v. *Peck*, 3 Stark. 66.

(*g*) *Buchanan* v. *Dennistoun and Co.*, 1835, 13 S. 841.

(*h*) *Rose* v. *Moore*, 1833, 11 S. 344. See also *Booth* v. *Commercial Bank*, 1823, 2 S. 273.

stretched by mere implication. It has accordingly been held in England, that directors have no implied power to bind the company by granting indemnities (bonds of relief) (*a*). But it must be observed, that directors as well as partners giving guarantees or indemnities as on behalf of the company, are held personally bound, where their acts do not bind the company (*b*).

Personal liability.

LENDING.

In companies established for the express purpose of lending money, as *e.g.* pawnbroking companies, every partner is necessarily presumed to have this power; and the same will also hold true in the case of banking and insurance companies, when their business is known to be carried on in this manner. But in partnerships, where lending money does not fall under the scope of the ordinary business, it is probable that such a power would not be held to be implied. In no case would a partner be entitled to lend partnership funds as a favour to the borrower, and on the understanding that no interest was to be paid.

It has never been decided, so far as the author is aware, either in this country or in England, whether a partner is entitled to lend the partnership funds in such a way as to prevent them being immediately available for the requirements of the business; as, for example, to invest them for a term on heritable security, on debentures, or the like. Reasoning from analogy, it should seem that no such power is implied in ordinary partnerships; for, if it were, the whole purposes of the copartnery might at any time be defeated. Besides, this would be an application of the company funds never contemplated, and probably entirely at variance with the objects of the contract; nor could it be defended on the ground of urgency.

LETTING AND HIRING.

Letting.

As in the preceding case of loan, this power of letting will be implied where such transactions form part of the ordinary business

(*a*) *Ridley* v. *Plymouth Grinding Co.*, 2 Exch. 711; *Kirk* v. *Bell*, 16 Q. B. 290.

(*b*) *Haddon* v. *Ayers*, 5 E. Jur. N. S. 408, Q. B.; *Barker* v. *Allan*, 5 H. and N. 61.

of the firm: *e.g.* in the case of a firm of horse-jobbers or livery-stable men. But it is very doubtful whether such a power would be implied, when letting for hire forms no part of the company business (*a*).

Hiring would seem to stand in a different position. It must often be of essential importance to the business of the firm to obtain the assistance of professional persons, of skilled artisans, or even of ordinary servants, and in like manner to secure the use of ships, conveyances, or articles of machinery. Nor are the public in a position to judge of when such assistance or use is necessary. It would therefore seem that, except in extreme cases, every partner must be held to have the implied power of hiring for the firm. Thus it has been decided that one partner may hire servants for partnership purposes (*b*), and the same power was held to exist in the committee of a trading association (*c*), and one partner may bind the firm by chartering a ship on its behalf (*d*). Where, however, a coach office was taken by a partner on his own credit, and was not used entirely for company purposes, the firm was not held liable for the rent (*e*). Though a trading firm should be reduced by death or otherwise to one partner, a contract of service entered into with the firm does not terminate, provided the surviving partner carries on the business (*f*). Hiring.

INSURANCE.

Mercantile agency by itself does not imply the power of binding the principal by insurance, nor has a co-owner, as such, power to bind the other co-owners by effecting an insurance in their name (*g*). Yet it has been held in England that a partner, as distinguished from a part-owner, may, without special authority

(*a*) See as to letting a shop, *Brown* v. *Smith*, 1821, 1 S. 286.

(*b*) *Beckham* v. *Drake*, 9 M. and W. 79. See also *Batard* v. *Hawes*, 2 E. and B. 287; *Edger* v. *Knapp*, 7 E. Jur. 583, C. P. See *Cowan* v. *M'Micking*, 1846, 19 Jur. 91.

(*c*) *Batchelor* v. *M'Gilvray*, 1831, 9 S. 549.

(*d*) *Thomas* v. *Clarke*, 2 Stark. 450.

(*e*) *Jardine* v. *M'Farlane*, 1828, 6 S. 564.

(*f*) *Campbell* v. *Baird*, 1827, 5 S. 311.

(*g*) *French* v. *Backhouse*, 5 Bur. 2727. Abbott on Merch. Ships, etc., 10th ed. p. 73.

from the others, bind them by insurances ordered in the name and on account of the firm (*a*). If one partner insures for the company, he would seem to have the power of abandonment for the company (*b*). From the reason of the thing, the same rule would seem to apply to managers and boards of directors. In the cases referred to, the insurance was effected for behoof of the company or firm; but it may be asked whether partnership property may be insured for behoof of and in the name of one partner. As to this, Kent, C. J., said: 'There can be no doubt that a partner has such interest in the entirety of the cargo (belonging to the firm) as to enable him separately to insure it, and that an averment that he had an interest in the property to the amount of the insurance is supported by proof of a partnership interest to that amount' (*c*). It has been doubted whether a partner in a particular adventure could insure the whole property in his own name. Obvious reasons might be suggested against the policy of conceding such a power.

(*a*) *Hooper* v. *Lusby*, 4 Camp. 66; *Robinson* v. *Gleadow*, 2 Scott 250; *Routh* v. *Thompson*, 13 East 274; *Armitage* v. *Winterbottom*, 1 Man. and Gr. 130. See also the Scotch case, *Campbell* v. *Stein*, 1813, 17 F. C. 456, aff. 6 Dow 116; Lindley 226; Coll. 289.

(*b*) *Hunt* v. *Roy*, *Ex. Insur. Co.*, 5 M. and S. 47.

(*c*) American case. See Phillips on Insurance 62.

CHAPTER XIII.

CONSTITUTION OF COMPANY OBLIGATIONS.

Nature of company obligations.

COMPANIES, partnerships, and firms, being according to the law of Scotland *quasi* persons, are capable of incurring obligations both to the public and their own members; and these must be regarded as the proper obligations of the association, viewed as a separate person, and not as the joint and several obligations of the partners. Such obligations, when validly contracted, do indeed infer liability against the partners individually; but, according to the theory of Scotch law, this arises not from the partners being direct obligants, but by reason of their being bound *singuli in solidum* as sureties for the company.

Peculiarities arising from element of agency.

The company being, however, an artificial and not a natural person, incurs obligations by means of its agents, who are either the partners of a firm, or the managers or other officials of a company. In considering, therefore, the law applicable to the constitution of company obligations, regard must always be had to the doctrines of agency, of which the principles now about to be considered are merely a particular adaptation.

Origin of obligations.

Obligations, viewed in reference to their origin or constitution, were divided by the civilians into two great classes: 1. Obligations arising *ex contractu*, or *quasi ex contractu;* and 2. Obligations arising *ex delicto*, or *quasi ex delicto*. This division may with advantage be followed in discussing this branch of the subject.

I. OBLIGATIONS ARISING FROM CONTRACT AND QUASI CONTRACT.

Contract and *quasi* contract.

General principles.

An obligation arising from contract or *quasi* contract is an engagement or undertaking to do or refrain from doing something, and vests in the obligee a right to demand performance. To a

valid obligation, consent on the part of the obligor is absolutely necessary. It may be proved by writ, by acts, or *prout de jure*, according to the nature of the contract. Sometimes the contract is not completed at once, the consent being suspended. In this case it is technically said that there is *locus pœnitentiæ*.

If, however, in this state of matters anything important is permitted by the obligor to be done by the obligee, on the faith of the inchoate contract, so that matters no longer remain entire, then *rei interventus* is said to take place, and there is no longer *locus pœnitentiæ*. If, again, while the contract still remains incomplete from defect or informality, something is done by the obligor in respect of which it is confirmed or adopted, homologation is said to take place, and the contract cannot afterwards be repudiated or resiled from (*a*).

These principles are all of them applicable to contracts entered into by a firm or company, and in their application sometimes give rise to important questions.

Modes in which the Company is bound.

Written contracts by unincorporated associations;

As regards unincorporated associations, whether they be mere firms or common law companies, the proper mode of binding the concern is by all the members signing their names individually (*b*). And this rule, which arises from the fact that such associations are not corporations, should be rigidly adhered to in all contracts of importance, particularly such as do not fall within the ordinary sphere of the company's line of business—*e.g.* where a cash credit bond is signed by a company as sureties. But it is not rigidly enforced in the case of mercantile documents plainly falling within the company's sphere of operations, where a partner has implied powers of agency to bind the concern (*c*). In such cases the company will be bound by any partner subscribing the social name when it includes the name of one or more individuals (*d*). It will also be bound by his signing his own name *per procurationem* for the company, and in so doing he may designate the company by a descriptive name

(*a*) Shaw's Bell's Prin. p. 12.

(*b*) *Christie* v. *Reid*, 1826, 4 S. 368; *Melliss* v. *The Royal Bank*, 1815, 18 F. C. 454.

(*c*) See *Robb* v. *Forrest*, 1830, 8 S. 839; *Forsyth* v. *Hare and Co.* 1834, 13 S. 42; *M'Lean* v. *Rose*, 1836, 15 S. 236.

(*d*) *Selkrig* v. *Dunlop*, 1804, Hume 277.

which does not include the names of individuals, provided such name is that by which the company is generally known (*a*); but signature by the descriptive name without joinder of the signing partner as agent would not, it is thought, be enough (*b*). Care must be taken, however, in thus signing *per procurationem*, that the fact of agency plainly appear *ex facie* of the signature, otherwise the obligation may be held to be that of the partner as an individual, and not of the company (*c*). All such compendious modes of binding the company depend for their validity on the fact of the transaction being within the company's known line of business, and therefore covered by the agency of the partner signing the document. If this is not so, the partner may indeed be bound personally, but the company will, unless upon other grounds, incur no obligation whatever (*d*).

by corporations.

As to corporations, it would rather appear that the ancient common law of Scotland resembled that of England in requiring contracts of importance to be evidenced by deed under the common seal (*e*). If, however, this were so, the custom has long since gone out of use; and it has become the rule, that corporations may be bound by the signature of their officers duly appointed for that purpose, and signing *per procurationem* (*f*).

Incorporate associations.

But as regards incorporated mercantile associations, it may be laid down as a general rule, that they will only be effectually bound when the formalities have been duly observed which are contained in the instruments of their incorporation, whether charter or general or special act (*g*).

Act of 1845.

The provisions of the Company Clauses (Scotland) Act, 1845, with reference to this matter, are as follows: 'With respect to any contract which, if made between private persons, would be by law

(*a*) See *Blair Iron Co.* v. *Alison*, 1855, 18 D. H. of L. 49, 27 Jur. 614; *Fleming* v. *Ballantyne*, 1842, 5 D. 305.

(*b*) *Culcreuch Cotton Co.* v. *Mathie*, 1822, 2 S. 47, Sh. Bell's Pr. 399.

(*c*) See *Aberdeen Brew. Co.* v. *Gray*, Wil. Thom. Bills 164; *M'Gavin* v. *Ogilvie*, 1854, 16 D. 540; *Johnston* v. *Cliftonhill Coal Co.*, 1852, 15 D. 84.

(*d*) See, as to this, *M'Nair and Co.* v. *Gray, etc.*, 1803, Hume 753; *Clarke* v. *Shepherd*, 1821, 1 S. 179; *Kennedy*, 1814, 18 F. C. 152.

(*e*) Ersk. i. 7, 64; Act 1555, c. 29; Act 1579, c. 80; Reg. Maj. l. 3, c. 8; Kames' Eluc. Art. 24.

(*f*) *Bowie* v. *Wilson*, 1695; *Mag. of Pittenweem*, 1752; *Livy* v. *Mudie*, 1774; *Anderson* v. *Morton*, 1779, all in M. 2511 *et seq.*

(*g*) See *Great Nor. Ra. Co.* v. *Inglis*, 1851, 13 D. 1315, aff. 1852, 24 Jur. 434.

required to be by deed or by agreement in writing, and signed by the parties to be charged therewith, then such committee (*i.e.* a committee of the directors) or the directors may make such contract on behalf of the company, in writing, either under the common seal of the company, or signed by such committee or any two of them, or any two of the directors, and in the same manner may vary or discharge the same' (*a*).

Act of 1862. The Companies Act of 1862, unlike that of 1856, makes no provision dispensing with the use of the common seal in the execution of deeds; but, on the contrary, it expressly mentions the possession of a common seal as one of the incidents of incorporation under its provisions (*b*); and provides that powers of attorney may be granted to persons abroad to execute deeds on its behalf under their own seals, on condition that such power of attorney shall be in writing under the common seal (*c*). Bills and promissory-notes may however be made, accepted, or indorsed on behalf of the company without the use of the common seal, if signed in the name of the company by any person acting under the authority of the company, or if signed on behalf of or on account of the company by any such person (*d*).

Act 1864. 'The Companies Seals Act, 1864' (*e*), gives certain facilities for sealing deeds executed in foreign countries, to such registered companies as choose to adopt its provisions in their articles of association or by special resolution (sec. 6). According to these provisions, a company under the Act of 1862, and carrying on business in foreign parts, may cause an official seal to be prepared *fac simile* of their common seal, but having in addition inscribed on the face thereof the name of each and every place, district, or territory abroad, where it is intended to be used, and may from time to time break up and renew such seal or seals, and vary the limits within which it is intended to be used (sec. 2). The company, by instrument under its common seal, may empower agents, boards, managers, etc., to affix this official seal to all documents requiring such attestation; and the powers so given continue in force for the time specified in the instrument, or until notice of revocation (sec. 4). The person affixing the seal must, by writing under his

(*a*) 8 and 9 Vict. c. 17, s. 100. (*b*) Sec. 18.
(*c*) Sec. 55. (*d*) Sec. 47. (*e*) 27 Vict. c. 19.

hand on the document sealed, certify the date and place of sealing; and the company will be thus as effectually bound as if the document had been under the common seal (sec. 5).

Letters Patent Acts.

The Letters Patent Acts contain no provisions relative to this matter.

Contracts other than by writing.

As to contracts perfected otherwise than by writing, the rule is that the company, whether corporate or unincorporate, will be bound by the proceedings of its accredited agents acting in that character, and so that they themselves would be bound if acting as principals.

Act of 1845.

The provisions of the Companies Clauses Consolidation (Scotland) Act, 1845, in relation to this matter, are as follows:—'With respect to any contract which, if made between private persons, would by law be valid, although made by parole only, and not reduced to writing, such committee (*i.e.* a committee of the directors) may make such contract on behalf of the company by parole only, without writing, and in the same manner may vary or discharge the same' (*a*).

Perfecting of contract *rei interventu*.

If a contract be merely pending between the firm and a stranger, any one of the partners may rivet it indissolubly *rei interventu*, *e.g.* by accepting on the part of the company delivery of goods in relation to which the sale had not been formally completed.

Whether a partner binds the company or himself.

It is often a matter of difficulty to determine whether, in contracting, a partner has bound the company, or merely himself, or both; in other words, whether he acted as a principal, as an agent, or in both characters. To determine such questions, recourse must be had to the law of principal and agent, the principles of which, both in the English and Scottish systems, may be briefly stated as follows:—

Principles of agency.

If an agent discloses his principal, and represents himself as acting *factorio nomine*, he binds not himself, but his principal (*b*). If he does not disclose his principal, he binds himself (*c*). If a

(*a*) 8 and 9 Vict. c. 17, s. 100.

(*b*) *Brown* v. *M'Dougall and Co.*, 1802, 13 F.C. 146, Mor. App. Factor 1; *Cowan* v. *Davidson and Co.*, 1814, 17 F. C. 505; *Jobson* v. *Ford*, 1815, Hume 354; *Findlay* v. *Fleming and Co.*, 1832, 10 S. 739; *Hampton* v. *Adam*, 1839, 1 D. 500; *Millar* v. *Mitchell*, 1860, 22 D. 833.

(*c*) *Robertson* v. *Gillespie*, 1823, 2 S. 375; *Edin. and Glasgow Bank* v. *Steele*, 1853, 25 Jur. 245. 1 Bell's Com. 492. See *Ferrier* v. *Dodds*, 1865, 3 Macph. 561.

contract be made with a man on his own credit, he cannot escape from personal liability, by showing that it was known at the time that he was acting as agent for another (*a*); and if, in such a case, the transaction was specially concluded on the credit of the agent alone, the principal will not be bound, even though his existence was disclosed at the date of the contract (*b*). The case is *a fortiori* where the existence of the principal is only discovered after the date of the contract. If, again, an agent contracts ostensibly for a disclosed principal, and also adjects his own credit, both will be liable (*c*). If an agent disclose his agency, but conceal the name of his principal, the latter, on discovery, will be held liable. If a man induce another to contract with him on the representation that he acts for another party to that effect, and this afterwards turns out to be untrue, the party making the false representation cannot, in general, be compelled to specific performance, but he will be held liable in damages to the party he has deceived (*d*).

Application to companies.

When these rules are applied in questions arising between companies, their members, and the public, and when it is borne in mind that in partnership agency is more frequently implied than express, the following would seem to be the results:—

General rules.

1. If a partner contract with a stranger in his character of partner, he binds the company, and is himself liable only as a member thereof (*e*). He may, however, in this case render himself directly liable, *e.g.* by representing himself as sole partner (*f*), or by contracting not only as a partner, but as an individual (*g*).

2. If a partner contract not as a partner, but as an individual, he binds not the firm, but himself; and even though the firm should

(*a*) *Lang and Co.* v. *M'Leod*, 1830, 8 S. 323; *Sorley's Trs.* v. *Graham*, 1832, 10 S. 319. 1 Bell's Com. 492.

(*b*) *Young* v. *Smart*, 1831, 10 S. 130; *Stevenson* v. *Campbell*, 1836, 14 S. 562.

(*c*) See previous cases, and *Woodside* v. *Cuthbertson*, 1848, 10 D. 604.

(*d*) *Millar* v. *Mitchell*, 1860, 22 D. 833; *Brown* v. *M'Dougall*, 1802, M. *voce* Factor, App. No. 1; *Burgess* v. *Buck and Co.*, 1829, 7 S. 824. See as to English law, Addison on Contracts, 4th ed.; Bacon's Abridgment, *voce* Merchants and Merchandise; Smith's Mercantile Law; Livermore's Treatise on Agency; Story on Agency; Lindley 261, 294; and the cases and authorities quoted in *Millar* v. *Mitchell*, *supra*.

(*e*) *Ex parte Buckley*, 14 M. and W. 469; *ex parte Wilson*, 3 M. D. and D. 57; *Millar* v. *Mitchell*, *supra*; *Brown* v. *M'Dougall*, *supra*.

(*f*) *De Mautort* v. *Saunders*, 1 B. and Ad. 398; *City of London Gas Co.* v. *Nicholls*, 2 Car. and Pa. 365; *Whitwell* v. *Perrin*, 4 C. B. N. S. 412.

(*g*) *Higgins* v. *Senior*, 8 M. and W. 834; *ex parte Wilson*, 3 M. D. and D. 57.

de facto receive the entire benefit of the transaction, the creditor would seem to have no recourse except against the partner on whose individual credit he had contracted (*a*).

3. If a partner contract avowedly on behalf of the firm, and it afterwards turns out that the firm is not liable, in respect that he had no authority, either express or implied, to bind it by such a transaction, he will be liable to indemnify the creditor for whatever loss may have been sustained, whether it may be attributable to fraud or an innocent mistake (*b*).

Questions of fact.

Such appear to be the principles which the law will apply in cases of the kind under consideration. But it may be observed, that the question, whether a man transacted as an individual or as a partner, and whether he disclosed or concealed the names of his copartners, and the like, are questions of fact, are aided (at least in modern practice) by no presumptions of law, and are properly within the province of a jury or its equivalents to determine (*c*).

Occasional difference.

In the common case of principal and agent, the powers of the latter are in general express; but in the case of partnerships the powers of the partners are for the most part left to be implied from the nature of the business. This circumstance gives rise to specialties, which it will be necessary to examine somewhat in detail.

As regards strangers.

In the absence of notice to the contrary, the public are entitled to deal with every known partner of a firm on the assumption that he is vested with such powers as are necessary or usual in carrying on the business in the usual way. The consequences of this may be stated as follows (*d*): If a stranger *bona fide* contracts with a partner acting ostensibly for the firm, in a matter which may fairly be presumed to be within the implied agency, the company will be bound, though in point of fact the partner may have had no such authority, or may have been expressly prohibited from transacting for the company in the matter in question (*e*). But if, on the other

(*a*) *Emly* v. *Lye*, 15 East 6, 3 Ross L. C. 552; *Crum and Co.* v. *M'Lean*, 1858, 20 D. 751; *Tupper and Carr* v. *Rowell*, 1858, 20 D. 758.

(*b*) *Finlayson* v. *Braidbar Quarry Co.*, 1864, Macph. 1297; *ex parte Agace*, 2 Cox 312; *Lloyd* v. *Freshfield*, 9 Dowl. and Ry. 19.

(*c*) *Millar* v. *Mitchell*, 1860, 22 D. 833.

(*d*) See Powers of Partners.

(*e*) *M'Nair and Co.* v. *Gray, etc.*, 1803, Hume 753; *Kennedy*, 1814, 18 F. C. 122; *Miller* v. *Douglas*, 1811, 16 F. C. 154; *Blair* v. *Bryson*, 1835, 13 S. 901; *M'Leod* v. *Tosh*, 1836, 14 S. 1058.

hand, the stranger knows, or by ordinary reflection might know, that the partner was overstepping his powers, the firm will incur no liability (*a*). The partners may indeed, by arrangement among themselves, limit the sphere of this implied agency in any way they choose; and such provisions or regulations will receive effect *inter socios*, so as to found indemnity against the partner who transgresses them (*b*); but they will have no effect whatever in a question with the public, unless it can be shown that they were within the knowledge of the person who transacted with the partner by whom they were infringed (*c*).

Effects of notice.

If, however, it can be shown that the party had notice of the restriction, then the firm will not be bound (*d*). This notice may be by circular-letters to the correspondents of the firm (*e*), or by advertisement in the public prints; but in the last case there must be evidence that the notice reached the creditor (*f*). It is not necessary, however, that notice shall be proved *scripto*. If knowledge of the restriction can in any way be fixed against the creditor, it puts him in *malâ fide*, and estops him from proceeding against the firm (*g*).

Powers never presumed.

There are some powers which, from the nature of the company business, the law will not presume to appertain to the partners, and which a little consideration might satisfy any one the partners were not likely to possess, *e.g.* power to guarantee strangers (*h*), to sell real property (*i*), to submit to arbitration (*k*), etc. If a third party contract with a partner in matters of this kind he will have no claim against the firm, unless he can prove that such power actually existed, or that by former acts and deeds of the firm he had been led to believe in its existence.

Fraud.

Cases of gross fraud too often occur, in which it cannot be said that a partner has exceeded the limits of his agency, but rather

(*a*) *Proudfoot* v. *Lindsay*, 1825, 3 S. 310; and previous cases.

(*b*) See Indemnity.

(*c*) Shaw's Bell's Com. 218; *Dewar* v. *Miller*, 1766, M. 14569; *Gleadon* v. *Tinkler*, Holt N. P. Cas. 586; *Morans* v. *Armstrong*, Arms., M. and O. Irish N. P. Rep. 25.

(*d*) *Galway* v. *Matthews*, 10 East 264, 1 Bell's Illus. 242, and 3 Ross Lead. Ca. 507; *Blair* v. *Miller and Douglas*, 1811, 16 F. C. 154.

(*e*) *Willis* v. *Dyson*, 1 Stark. 164.

(*f*) *Rooth* v. *Quin*, 7 Price 193; *Galway* v. *Matthews*, *supra*.

(*g*) *Alderson* v. *Pope*, 1 Camp. 404.

(*h*) See p. 225.

(*i*) See p. 214.

(*k*) See *post.*, Arbitration.

that he has exercised it for purposes for which it was never intended. Thus a partner may order goods on the credit of the firm, and when received apply them to his own private purposes (*a*). He may accept a bill in the company's name, and having discounted it put the proceeds in his own pocket (*b*). In these and similar cases the company is liable; for the acts done were plainly within the implied agency, and the party with whom the transaction took place was under no obligation to see that its proceeds were properly applied.

Obvious fraud.

There are, however, some transactions which, though they fall within the limits of implied agency, are of such a nature that they carry fraud, or at least grave suspicion, on their very face. Thus, if a partner grants a note or accepts a bill in the company name, and afterwards tenders it in payment of his private debt, the creditor may fairly presume fraud, if he is aware that the signature of the firm is in the handwriting of his debtor. And accordingly, in such circumstances, the creditor has been found not entitled to recover against the firm. But as a partner may be a creditor of the firm, the mere fact of his tendering a bill accepted in the company name, in payment of his own debt, does not, in the absence of other circumstances, establish fraud; and therefore the firm will in such a case be bound, if the creditor can prove that he acted in perfect *bona fide* (*c*).

General remarks.

In conclusion, it may be observed, that while the rules as to what infers and what excludes company liability for the unauthorized acts of its partners or other agents are as above detailed, their practical application often depends on a mere balance of circumstances more fitted for the consideration of a jury than any other mode of decision (*d*). But in every case it is well for partners to

(*a*) *Bond* v. *Gibson*, 1 Camp. 185.

(*b*) *Lane* v. *Williams*, 2 Vern. 277; *Ridley* v. *Taylor*, 13 East 175, 3 Ross L. C. 492.

(*c*) *Wells* v. *Masterman*, 2 Esp. N. P. Ca. 730; *Miller* v. *Douglas*, 1811, 16 F. C. 154, 3 Ross Lead. Ca. 500; *Green* v. *Deakin*, 2 Stark. 347. See also *Hope* v. *Cust*, 1 East 51, 3 Ross L. C. 486; *ex parte Bonbonus*, 8 Ves. jun. 540, 3 Ross L. C. 470; *Johnston and Sharp* v. *Phillips*, 1822, 1 S. App. 244; *Wallace* v. *Campbell*, 1824, 2 S. App. 467; *Turnbull* v. *Mackie*, 1822, 1 S. 331; *Willet* v. *Chambers*, 2 Cowp. 814, 3 Ross L. C. 476. See an instance where a bill granted in name of a company by a manager and a majority of the partners was found not binding on the company, by reason of its having been granted for a private debt, *Proudfoot* v. *Lindsay*, 1825, 3 S. 310.

(*d*) *Turnbull* v. *Mackie*, 1822, 1 S. 331; *Millar* v. *Mitchell*, 1860, 22 D. 833.

bear in mind, that to entitle the company of which they are members to the protection which the law gives against unauthorized acts, it is always essential that it shall have acted with perfect fairness and good faith. Nothing must have been done which could deceive the contracting party into the belief that the transaction had been adopted by the company, or could induce him to delay proceeding against the partner by whom he had been misled. And in general it seems only fair, that as soon as the transaction comes to the knowledge of the company, intimation of its being unauthorized should be made to the opposite party (*a*).

Ratification.

When a contract is invalid against the company by reason of the transaction having been *ultra vires* of the partner with whom it was entered into, and its having been known to be so by the party with whom the contract was made, it may generally be validated by *rei interventus*, homologation, or adoption on the part of the company (*b*). But it must always be considered whether the particular transaction be one within the limits of the company's powers. If it be not, no ratification however formal by any number of partners less than the whole will validate the transaction; for what a majority could not do originally, they cannot ratify by any subsequent act (*c*). If the transaction lie within the scope of the company's sphere of action, it will be validated by the ratification of any partner possessing the necessary agency, express or implied, or by its proceeds being *in rem versam* of the company, whether this have taken place by a partner having the requisite agency or not; for the mere fact that the firm has allowed the proceeds of the transaction to be so applied, is the best proof of its ratification (*d*). If again the transaction is invalid, as being beyond the company's sphere of action, the company, if they have taken the benefit of it, will be liable to indemnify the opposite party, and to restore him as far as possible to the position he occupied before entering into the transaction (*e*).

As to ratification by companies of acts done by their directors or other officials, see 'Powers of Directors.'

(*a*) *Proprietors of Bo'ness Canal* v. *M'Alpine and Co.*, 1791, Hume 751.

(*b*) *Blaikie Brothers* v. *Aberdeen Ra. Co.*, 1851, 14 D. 66, House of Lords 1852.

(*c*) See 'Powers of Majorities,' and *Proudfoot* v. *Lindsay*, 1825, 3 S. 310.

(*d*) See *Duncan* v. *Lowndes*, 3 Camp. 478. 3 Ross L. C. 475.

(*e*) Lindley, S. App. 71.

Damages for Non-fulfilment of Contracts.

Contracts or *quasi* contracts.

If a firm or company fail to fulfil an obligation arising from contract or *quasi* contract, but without fraud or fault, it becomes liable in damages to the creditor for that which he has directly lost or has been prevented from gaining, coupled with the costs of the proceedings for obtaining reparation (*a*). The expression '*without fraud or fault*' is here used to mark the distinction between liability for innocent breach of contract and liability for delict. The first measures the reparation by the direct damage merely; the second by the highest advantage which, but for the delict, would have been enjoyed. It is sometimes difficult to determine what is exactly meant by the expression direct damage, as opposed to that which is collateral or consequential. A few observations on this subject may not be out of place.

Damage, direct and consequential.

Loss of interest.

In pecuniary obligations the damages take the form of interest; and when failure to implement has not arisen from delict, the interest is not to be measured by what the creditor might have turned out of the principal by embarking it in his trade or in some fortunate speculation, but at the rate of 5 per cent., which is still regarded as in such cases the legal rate of interest (*b*). Where, however, a special contract has been made to deliver a sum of money against a particular day in order to be employed in a particular manner, it seems fair that the company should be held liable in interest commensurate with the damages which in similar circumstances would arise from the non-delivery of goods.

English practice.

When a breach of contract takes place from the non-delivery of goods, it has been the custom in England to award damages according to the price at or about the day when the goods were contracted to be delivered; while, when the breach of contract arises from failure to return stock lent, the damages have been assessed at a higher rate, because in this case the borrower has the lender's goods in his hands (*c*).

(*a*) Stair i. 17, 16; Ersk. iii. 75, 86. See Smith on Reparation. It is essential, however, in all such cases, that the stipulation for breach of which damage is claimed plainly appears *ex facie* of the contract. *Walker* v. *Caledonian Ra. Co.*, 1858, 20 D. 1102.

(*b*) See *Smith*, 1857, 19 D. 267.

(*c*) *Leigh*, 8 Taunt. 540, Bell's Ill. 42; *Gainsford*, 2 Barn. and Cress. 624, do. 42.

Scotch practice.

In Scotland this distinction does not appear to have been observed; but the practice seems to have been to take as the criterion of damage either the highest price which might have been got for the goods at any time after the date of the sale, or the average value between the stipulated time of delivery and that of raising the action. A list of the more important decisions bearing on this subject is given below (*a*).

As to damages arising from loss of profits, see cases noted below (*b*).

When both parties are in fault.

If the loss arises from the fault of both parties under a contract of sale, the general rule was that it must be borne equally by both (*c*). Latterly, however, it has been laid down that there is no fixed rule as to the particular time at which the difference in the price of goods ought to be taken for the purpose of fixing the amount of damage sustained by non-delivery in breach of contract, but that each case must be regulated by its own circumstances, and determined by the verdict of a jury (*d*).

Stipulated damages.

Sometimes damages are stipulated in the contract, as exigible in the event of its non-fulfilment. If this be so, no inquiry into the actual damage seems competent (*e*). If, however, the obligation be merely fortified by a penalty, that is held the limit within which the jury may assess damages (*f*).

II. OBLIGATIONS ARISING FROM DELICT AND QUASI DELICT.

Delict.

A delict is an offence committed with an injurious, fraudulent, or criminal purpose. Such an act involves all who are concerned in its commission in criminal penalties; but independently of these, it also subjects them in civil damages.

(*a*) *Morrin*, 1806, M. Damage App. 1, aff. 5 Paton 649; *Shirra*, Dec. 11 1807, F. C.; *Robison and Co.*, 1808, 15 F. C. 74; *Anderson*, 1809, 15 F. C. 206; *Dunlop*, 1815, 18 F. C. 382; *Bell* v. *Leighton*, 1819, 2 Mur. 74; *Strachan* v. *Paton*, 1824, 3 S. 259, N. E. 184, aff. 3 W. and S. 19; *Roberts*, 1825, 4 Mur. 3; *Watt* v. *Mitchell*, 1839, 1 D. 1157; *Dickson* v. *Henderson*, 1849, 12 D. 306.

(*b*) *Watson* v. *Kidston*, 1 D. 1251 (1830); *Mags. of Montrose* v. *Forsyth*, 1834, 12 S. 429; *Downe* v. *M'Kinlay*, 1834, 12 S. 528.

(*c*) *Reid* v. *Steele*, 1824, 3 S. 141. See also *Scott* v. *Selbie*, 1836, 14 S. 574.

(*d*) *Watt* v. *Mitchell*, 1839, 1 D. 1157; *Higgins and Sons* v. *Dunlop and Co.*, 1847, 9 D. 1407.

(*e*) *Mortimer* v. *Millar*, 1849, 11 D. 1218.

(*f*) See Bell's Prin. p. 17.

A *quasi* delict may be defined to be that gross negligence or imprudence, less than actual fraud or malice, in the doing of something, either obligatory or lawful, by reason of which another is injured in person, property, feelings, or character. This also involves all concerned in liability for reparation. *Quasi* delict.

In order to understand in what manner firms and companies incur liability for delict or *quasi* delict committed by their members or agents, it is necessary to advert again to the doctrines of agency. Doctrines of agency.

A principal becomes liable for the delict or *quasi* delict of his agent, when—1*st*, he has authorized it to be done, either expressly or by implication; 2*d*, when he has adopted it, either during or after completion; 3*d*, when it has been done by the agent in the course of and as part of his employment.

But, on the other hand, the principal is not liable when he has neither ordered nor authorized the thing to be done, and especially when he has forbidden it; nor, again, is he liable for the act of his agent done maliciously, and not in the course of his employment or as part of his business.

These rules, by which the liability of principals for the acts of their agents is determined, are equally applicable to companies and firms; it being borne in mind that the company or firm is the principal, and that the agents are either the partners or some other persons employed by the society to act on its behalf. Application to companies.

Some illustration will now be given of the application of these rules; and as it is quite the same whether the principal be an individual or the *quasi* person of a company, they will be taken indifferently from cases of both kinds.

If an agent receive money or goods on behalf of his principal, or in the course of the business in which he represents his principal, and embezzles or misapplies it, he renders the principal liable. A solicitor who was employed to recover the contents of a bill from a debtor, put it into the hands of a messenger to execute diligence, and to receive and remit the money. The messenger got the money, but failed to remit. The solicitor was found liable for it to his client (*a*). The same result would have followed if in this case the principal had been a company of solicitors instead of an individual, and the delict had been committed by one of their own number as Embezzlement by member of company.

(*a*) *Brown* v. *Forsyth*, 1790, Hume 318.

agent for the firm. So, in the English case of *Willet* v. *Chambers* (*a*), a partner of a firm of solicitors having received money from a client to invest on mortgage, and misapplied it, the firm was found liable to the client. So, also, where one of a firm of solicitors fraudulently obtained money out of the Court of Chancery, but entirely without the knowledge of his partners, and handed it over to the client, the firm was found liable (*b*).

Money obtained in course of business.

In like manner, when a firm has, in the ordinary course of its business, received money or property belonging to others, if any one of the partners misapplies it while in the custody of the firm, the firm is liable.

In *Sadler* v. *Lee* (*c*), the members of a banking company were authorized to sell out stock standing in the name of a customer. One of the partners did so, and the firm received the proceeds of the sale. Another partner afterwards misapplied them. The company was found liable.

Ignorance of partners does not avoid liability.

It in no wise lessens the liability of the firm, that the money which was afterwards misapplied was originally placed in the custody of the firm by a fraud of one of the partners of which the others were ignorant, or even that they knew nothing of the money having ever been in their custody. If the funds were placed to the credit of the firm by its partner or known agent, the firm was bound to know that it had received such funds, and was bound to see that they were properly applied (*d*).

Money must have been received in the line of the company business.

But in all such cases it is essential to ground liability against the firm, that the money or goods shall have been received by the partner or agent, or placed by him in the custody of the firm, while engaged in the business of the firm. In other words, the act which raises the liability must have been done within the limits of his agency, express or implied. If this is not so, then no liability is incurred by the partnership, and the maxim applies, *Culpa tenet auctores suos*. Thus, if money were to be entrusted to the partner or agent of a concern, in order to be laid out on security, and it

(*a*) 2 Cowp. 814, 3 Ross L. C. 476.

(*b*) *Brydges* v. *Branfill*, 12 Sim. 369.

(*c*) 6 Beav. 324. See also *Devaynes* v. *Noble*, 1 Mer. 575; *Vulliamy* v. *Noble*, 3 Mer. 593; *Blair* v. *Bromley*, 2 Ph. 354; *ex parte Biddulph*, 3 De G. and Sm. 587; *Devaynes* v. *Noble*, 1 Mer. 611 and 624.

(*d*) *Keating* v. *Marsh*, 1 M. and A. 582, 2 Cl. and Fin. 250; *Stone* v. *Marsh*, 6 B. and C. 551.

formed no part of the business of the concern to carry out transactions of this kind, the firm would not be liable if the partner afterwards should embezzle or otherwise misapply the money (*a*).

Private acts of partners.

It sometimes happens that a partner enters into transactions on his own account, and not as agent for his firm. If, in such circumstances, he commit a fraudulent act, such as misapplication of funds, he does not bind the firm; nor does it make any difference in a case of this kind, that but for his connection with the firm he would not have been in a position to commit the delict (*b*). In like manner, the mere fact of a partner being a trustee will not render the firm liable, if he employs the trust funds in the business of the firm, or even in payment of its debts (*c*). It might be argued, indeed, that the knowledge of the partner who was trustee must be held to be the knowledge of the firm; and this would be no doubt sound law, if the act was done in the line of the company's business. But in the supposed case it is not so. If, however, the firm can in any way be connected with the fraud,—if it can be shown, for instance, that the other partners know, or ought to know, that trust funds are being employed for the purposes of the firm,—liability at once attaches (*d*). Even though the firm is not liable for trust funds applied to its purposes by the fraud of one of its partners, yet if these funds can be identified in the custody of the firm, the beneficiary will be entitled to recover his own (*e*).

Identification of funds.

Execution of order intended for another firm.

If, within the limits of the company business, one or more partners execute an order which they know was intended for a third party, they by so doing render the firm liable in the consequences (*f*). But to create company liability in such a case, it is necessary that the order has been *de facto* executed by the company, and not by one of the partners as an individual.

Concealment or misrepresentation of

If one or more partners induce any one to contract with the firm under fraudulent pretences or misrepresentation, the firm is

(*a*) *Harman* v. *Johnson*, 2 E. and B. 61. See also *Slater* v. *Henderson*, 1822, 1 S. 229; *Sims* v. *Brutton*, 5 Ex. 802.

(*b*) *Bishop* v. *Countess of Jersey*, 2 Drew 143; *ex parte Eyre*, 2 M. D. and D. 66.

(*c*) *Ex parte Heaton*, Buck 386; *ex parte Apsey*, 3 Bro. C. C. 265. See *Cochrane*, 17 D. 322; *Laird*, 1855, 17 D. 984.

(*d*) *M'Farlane* v. *Donaldson*, 1835, 13 S. 725; *Smith* v. *Jamieson*, 5 T. R. 601; *ex parte Poulson*, De Gex 79.

(*e*) Lewin on Trusts 581; Lindley 250.

(*f*) *Dickson* v. *Dickson and Co.*, 1830, 8 S. 933; *ibid.* 1815, 1 Mur. 55 and 58.

important facts in relation to contract.

liable (*a*). Concealment of truth in such a case is as much a ground of liability as an assertion of falsehood; and therefore, where a shipping company contracted to carry goods, and concealed from the shippers that their vessel was under detention for payment of duties, they were found liable to the shippers for loss in consequence of detention (*b*).

In the English case of *Rapp* v. *Latham* (*c*), Parry and Latham were in partnership as wine merchants. Rapp contracted with them to purchase and sell wine for him on commission as they got opportunity. Parry, the active partner, obtained large advances from Rapp, which he represented were laid out in this way, and certain sums were paid him as the proceeds of the supposed sales. After a time it turned out that no purchase or sale had ever been made by the firm, and that the whole of Parry's representations were a tissue of falsehoods. The firm was held liable.

Fraudulent representations, however, only bind the firm when made within the limits of the implied agency; and no one is entitled to take the word of a partner as to special powers having been conferred upon him, without making proper inquiries on the subject, either by seeing the partnership contract, or ascertaining the fact from the other partners (*d*).

False Representations made to induce a Person to become a Partner.

False representations to induce one to become a partner.

It forms no part of the implied agency of a partner to induce others to join the firm or company. If such a power exist, it must be specially conferred. In most private partnerships it is not competent for one partner or any number less than the whole to assume a new partner, or to assign shares in favour of a third party, without the consent of all the others. The question can therefore hardly ever arise in a private partnership, whether the firm is liable for the fraudulent representations of a member which have induced a third party to enter the concern.

(*a*) *Gibb* v. *Wathen and Co.*, 1829, 5 Mur. 60.

(*b*) *Paul* v. *Old Shipping Co.*, 1816, 1 Mur. 64 and 70.

(*c*) 2 B. and A. 795. See also *Blair* v. *Bromley*, 2 Ph. 354; *Lovel* v. *Hicks*, 2 Y. and C. Ex. 46.

(*d*) See *antea*, pp. 198 *et seq.*

If, however, such a question should arise in a private firm, and a stranger should be induced to join the concern on the fraudulent misrepresentation of a partner, it is evident that no liability would attach to the firm in consequence, because the partner could have no implied powers to make such misrepresentations. Before liability could attach to the firm, it would be necessary to show that they had either made the misrepresentations as a body, or had somehow or other authorized one of their number to do so.

Joint-stock companies.

In companies of larger membership with transferable shares, each partner or shareholder is entitled to dispose of his interest in favour of whomsoever he will; and as the matter is personal to himself, whatever misrepresentations he makes will bind himself only (*a*). These larger associations are, however, managed by boards of directors; and a very important question has arisen, whether untrue representations made by any or all of such directors which have had the effect of inducing strangers to take shares in the concern, shall render the company liable.

Real subject of inquiry.

The real question in cases of this kind is, whether the parties by whom the misrepresentations were made actually represented the company in so doing; or, in other words, whether they held agency, express or implied, to get shares disposed of.

When acts of misrepresentation in line of business.

When it is for the benefit of the company, or in the course of its ordinary business, to obtain shares disposed of, the company will be liable to such persons as purchase on the misrepresentations of those to whom it has committed the management.

National Exchange Company v. *Drew*.

In the case of *The National Exchange Co. of Glasgow* v. *Drew*, a partner of the company, which combined the business of bankers and sharebrokers, purchased additional shares of the company's stock, the price of which was advanced to him as a loan by the company. The company having sued the purchaser for the sum so advanced, he stated in defence that he had been induced to enter into the transaction by fraudulent misrepresentations of the position of the concern given him by the directors in their reports, and upon the urgent solicitations of the company's manager, who, at the date of the transaction in which the company had acted as brokers, was fully aware that the company was insolvent, and that the shares were value-

(*a*) See *Lothian* v. *Carron Iron Co.*, 1864, 2 Macph. 556; *Keith* v. *Smart*, 1832, 10 S. 514.

less. The defence was sustained, on the ground that the directors and manager, when they made the fraudulent misrepresentations which induced the defender to purchase the additional shares, were acting within their implied agency, and represented the company.

The peculiarity in this case was, that the misrepresentations made were in reality made to the company, and the party deceived thereby was one of its own members. Nevertheless, Lord St Leonards said: 'I consider representations by the directors of a company as representations by the company, although representations made to the company' (*a*).

Graham v. North British Bank.

Graham v. *The North British Bank* (*b*) was a case of a similar kind. Here it was averred, that the holders of certain shares in a banking company being unable to meet its demands, the company agreed that they would endeavour to procure responsible persons to purchase them; and that with this view the company made fraudulent representations as to the value of the shares, and thereby induced the pursuer to become a purchaser. The conclusion of the action directed against the bank was for reduction of the transfers made in favour of the pursuer. It was pleaded in defence, that the granters of the transfers were not called as defenders. But the Court held that the action was relevantly laid against the company itself, inasmuch as the bank was the party by whom the false representations had been made (*c*).

National Exchange Company v. Drew and Dick.

In *The National Exchange Co.* v. *Drew and Dick* (*d*), a company had been established for the purpose of lending money, more particularly on the security of shares or stock, either of itself or of other companies; and for carrying on other branches of business, such as agency or brokerage. It had therefore an interest in promoting sales of its stock, not only as its profit consisted in lending money to parties who wished to deal in this manner, but because it obtained commission as well as ordinary interest upon the monies so advanced, and participated in the brokerage of the transaction. The defenders were led into the purchase of shares and taking a corresponding loan through written statements made by the

(*a*) 1850, 12 D. 950; aff. 1855, 18 D. (House of Lords) 6, and 2 Macq. 103.

(*b*) 1850, 12 D. 907. See also *Jardine's Trs.* v. *Carron Co.*, 1864, 2 Macph. 1101.

(*c*) See also the case of *Brown* v. *Syme*, 1834, 12 S. 536.

(*d*) 1860, 23 D. 1.

directors in their report to the company, and also through misrepresentations made by the manager of the company. In charging the jury, the Lord President laid it down as law, that, in making these statements, both the directors and the manager were acting as agents of the company and in the line of its business, and that the company was accordingly bound thereby (*a*).

When not in line of company business.

But, on the other hand, representations of a false or fraudulent description made by directors or other office-bearers of a company in relation to matters in which they do not represent the company, or beyond the scope of their agency, will not bind the company.

Allan v. *Commercial Exchange Company.*

In *Allan* v. *Wright and the Glasgow Commercial Exchange Company* (*b*), a person purchased shares from the representatives of a partner. Soon after the directors resigned, and a committee was appointed to wind up the affairs of the company, who made a call for contribution on all the shareholders. The pursuer brought an action of reduction of the transfer of the shares in his favour, on the ground that he had been induced to enter the company through fraudulent representations by the directors as to the property of the company, while in point of fact they knew that the loss already incurred was so great as, in terms of the company contract, to amount to a dissolution of the concern. But it was clear that, neither in terms of the contract nor from the nature of the business, was it ever contemplated that the directors were to endeavour to get shares disposed of; and it was not alleged that the partners had either authorized them to make the statements in question, or that they had in any way adopted them. The statements were, in fact, made to the company, and were not only not made for its benefit, but in opposition to its interests, and apparently to screen the directors themselves. In these circumstances it was held that the representations of the directors did not bind the company. The case of *Inglis* v. *Lumsden* (*c*) is also instructive, as containing a good exposition of the same principle.

Law-agents and special officers.

The representations of a special officer, such as a law-agent, will not bind the company, except in a matter within his sphere

(*a*) See the English cases of *Ranger* v. *Great Western Ra. Co.*, 5 House of Lords Cases 72; *Brockwell's* case, 4 Drew. 205; *Bell's* case, 22 Beav. 35; *Ayre's* case, 25 Beav. 513; *Gerhard's* case, 2 Ell. and Bl. 476.

(*b*) 1853, 15 D. 725.

(*c*) 1859, 21 D. 192.

of agency, and when they are made by him on behalf of the company.

Burnes v. Pennel.

This is well illustrated by the case of *Forth Marine Insurance Co.* v. *Burnes* (*a*). Here the directors of a company had issued and published reports to the shareholders,—reports which were calculated to lead to an erroneous impression as to the prosperous state of its affairs. Dividends were likewise paid which were unwarrantable. The law-agent of the company being applied to by Burnes, he gave him to understand that its affairs were in a highly prosperous condition, and in evidence of this statement laid before him a copy of the directors' report. Upon this Burnes was induced to purchase shares, not from the company, but from one of its members who was unable to pay certain calls made upon him. Upon these he paid the balance of the instalments due. Additional calls having now been made, Burnes refused payment on the ground that he had been deceived by the false reports of the directors, and the equally false representations of the law-agent. The Court, however, refused to sustain the defence, and on appeal the House of Lords affirmed the judgment (*b*). Here it was evidently no part of the business of a law-agent to induce the public to take shares in the company, or to make representations as to the state of its affairs (*c*). The same principle is still more clearly enforced and explained in the Lord President's (M'Neill) charge to the jury in the *National Exchange Company of Glasgow* v. *Drew and Dick* (*d*), already referred to. There his Lordship laid it down, that the representations of an individual director of a joint-stock company, not at the time acting in his official character, are not those of the company; and, in like manner, that the representations even of the manager, made not in the discharge of his duty as manager, but as a private individual, do not bind the company.

Representations bind only when issued for the purposes for which they were made.

Representations made by officials will only bind the company when issued for the purpose for which they were actually used. Thus reports by directors, intended only for the shareholders, will not be held as misrepresentations made by the company if they

(*a*) 1848, 10 D. 689.

(*b*) July 16, 1849, 6 Bell 541, 21 Jur. 540.

(*c*) See also the English case of *Bigge*, 5 E. Jur. N. S. 7; *Worth's* case, 4 Drew 529.

(*d*) 1860, 23 D. 1.

should afterwards fall into the hands of members of the public, and induce them to become shareholders, unless after they have been submitted to the shareholders they have been in some way adopted by them, or circulated by those who are officially entitled to bind the company (*a*). If regard, however, be had to the judgment in the House of Lords in the case of the *National Exchange Company* v. *Drew*, 1855 (*b*), it will be seen that very little will be held to make reports by directors the accredited representations of the company.

Innocent mistakes.

It must also be observed, that mistakes on the part of the directors in making reports on the state of the company affairs, unless these amount to intentional fraud, will not be held to be such misrepresentations on the part of the company as would vitiate and annul contracts entered into with them (*c*).

Practical results.

Upon the whole, therefore, it should seem that the following rules may be considered as settled in relation to the question of the liability of companies for the fraudulent representations of their directors or other officials.

1. Such representations will be held to be those of the company, when they have been made by officials in relation to matters within the sphere of their authority to represent the company, as established either by the letter of their instructions, or plainly deducible therefrom, by the nature of the company business, or by any other facts and circumstances which lead a jury to this conclusion.

2. They will also bind the company, when, after being made, they have been adopted and ratified by the shareholders.

3. They will not bind the company when made by officials in relation to matters beyond the sphere of their agency, express or implied, and never when in the character of private individuals.

4. No reports made by officials will bind the company, except when used for the purposes for which they were intended.

Tendency of the courts.

It may be observed, however, in conclusion, that from a laudable desire to ensure the safety of the public, the tendency of the tribunals seems to be to impute liability to companies for the acts

(*a*) *Forth and Marine Insurance Company* v. *Burnes*, 1848, 10 D. 689, aff. 1849, 6 Bell 541, 21 Jur. 540; *Allan* v. *Wright*, 1853, 1859, 15 D. 725.

(*b*) 18 D. 7, and 2 Macq. 103.

(*c*) *National Ex. Co.* v. *Drew*, 1860, 23 D. 1. See also, on this subject generally, the late case of *Graham* v. *Western Bank*, 1864, 2 Macph. 559, where all the authorities are quoted and fully discussed.

of their directors, whenever the state of the facts will at all warrant this conclusion.

Personal liability of officials.

In all cases, the officials who make such fraudulent representations are themselves liable in the consequences, whether liability attach to their constituents or not (*a*).

Criminal Acts.

Company not liable for criminal acts and delicts. First exception.

Though a principal is not in the general case liable for the criminal acts of his agent, yet two important exceptions exist to this rule. First, If the act is done in the course of carrying out an engagement which the principal has undertaken to fulfil, and the party with whom he has contracted is injured thereby. In cases of this kind the liability to the principal arises not from the delict of the agent, but from the fact that loss or damage has arisen to the obligee, from the obligor having either failed to fulfil his obligation, or having carried it out in an improper manner; and the liability would be the same from whatever cause the failure arose, unless it could be attributed to a *damnum fatale*, or some event which the principal could, by the exercise of ordinary skill and attention, have neither foreseen nor prevented. Thus, if a firm receive funds to be kept or employed for a certain purpose, and they are stolen or embezzled by one of their agents, *e.g.* clerks, assistants, or the like, the firm is liable (*b*). So, if a company undertake to carry passengers, they are liable for such injury as the passengers may receive from the recklessness or other improper conduct of their servants in the course of carrying out the engagement: as, *e.g.*, if the coach be overturned by the reckless driving of the coachman (*c*); if an accident occur in a railway, through the recklessness or culpable negligence of the company servants (*d*), whereby the passengers are injured.

Must take place in line of employment.

In all such cases, however, it is essential to ground liability

(*a*) See, as to this, chap. on Liabilities of Directors.

(*b*) See *Orr and Barber* v. *Union Bank*, as revd. 17 D. (H. L.) 24, 1 Macq. 513, 26 Jur. 632; *Cal. In. Co.* v. *British Linen Co.*, 1859, 21 D. 1197, aff. 23 D. 3, 4 Macq. 107; *Rhind* v. *Com. Bank*, 1860, 22 D. (H. L.) 2, 3 Macq. 643.

(*c*) *Drummond* v. *Macgregor*, 1813, 17 F. C. 232; *Allan* v. *M'Leish*, 1819, 2 Mur. 158; *Green* v. *Gardiner*, 1820, 2 Mur. 194; *Brash* v. *Steel*, 1845, 7 D. 539; *MacArthur* v. *Croall*, 1852, 24 Jur. 170.

(*d*) *Morton* v. *E. and G. Ra. Co.*, 1845, 8 D. 288; *Macglashan* v. *Dundee and Perth Ra. Co.*, 1848, 10 D. 1397; *Cargill* v. *ibid.*, 1848, 11 D. 216.

against the company, that the delict was done in the course of, and as part of, the obligation undertaken (*a*).

Second exception.

The second exception is when, in the course and as a part of carrying out the directions of his principal, the agent has committed a delict whereby some of the public have been injured. Thus, where a man desired his servants to remove wood growing on his own property, and in doing so they applied fire, whereby wood growing on the property of another was destroyed, he was found liable (*b*). So, when a man employed another to deliver wood, which he did by his servant, and in doing so a shed belonging to a third party was thrown down, the master was found liable (*c*). So, when a party entrusts a servant with the charge of a conveyance, and in consequence of his culpable negligence one of the public is killed or injured, the principal is liable (*d*). So, when a company, in consequence of the culpable negligence of their servant, fail to give due warning to one of the public to keep out of the way of danger, they are held liable (*e*).

Implied contract.

In all these and similar cases, where not the person contracted with but the public is injured, the liability of the principal, whether a company or an individual, arises, it would appear, from that implied contract or obligation which every one is held to make with the public, whereby when he does or orders anything to be done, he undertakes that it shall be done with due regard to the safety and interests of the lieges.

Innocent mistake.

It is often difficult to determine whether the act causing the injury or loss amounted to innocent mistake or delict; but under whatever category it may fall, the result is the same as to the company liability, so as it was done in the course and as a part of the employment for which the agent was retained.

Edict *nautæ, caupones, stabularii.*

Firms or companies of carriers, seamen, and innkeepers incur

(*a*) *Linwood* v. *Hawthorn*, 1817, 19 F. C. 327; aff. 1821, 1 S. App. 20. See also *M'Laren* v. *Rae*, 1827, 4 Mur. 384; *Miller* v. *Harvie*, 1827, 4 Mur. 388; *Dalrymple* v. *M'Gill*, Hume 387; *Thorburn* v. *Ellis*, 1811, 16 F. C. 246; *Waldie* v. *Roxburgh*, 1822, 1 S. 367, aff. 1 W. and S. 1.

(*b*) *Keith* v. *Keir*, 1812, 16 F. C. 679; *Hill* v. *Merricks*, 1813, Hume 397.

(*c*) *Anderson* v. *Brownlee*, 1822, 1 S. 442.

(*d*) *Baird* v. *Hamilton*, 1826, 4 S. 797; *M'Laren* v. *Rae*, 1827, 4 Mur. 384; *Elder* v. *Croall*, 1849, 11 D. 216.

(*e*) *Hunter* v. *The Edinburgh and Glasgow Canal Company*, 1836, 14 S. 17; *Fraser* v. *Dunlop*, 1822, 1 S. 243.

liabilities under the edict *nautæ, caupones, stabularii.* In these cases, as is well known, it is enough to create liability that goods have been abstracted, although the delict have been committed by persons for whom they are otherwise no way responsible (*a*).

Culpa lata equiparetur dolo.

There is a large class of cases in which companies, like individuals, incur liability either to the public or to those with whom they have specially contracted, not on the ground of actual delict, but from such a degree of negligence as in law *equiparetur dolo.* In such cases it is important to observe, that whether the ground of liability be negligence on the part of the members of the company, or of those for whom it is responsible, it is necessary that negligence really exist, there being no presumption of negligence *juris et de jure*, as in the case of *nautæ, caupones, et stabularii.*

Presumption of negligence.

There is, however, a presumption of negligence, arising from the mere fact of the damage, loss, or injury being proved to have arisen in the course of the company business; and when this has been established, the *onus* of showing that it was a *damnum fatale*, and that all due care and skill had been used, will lie on the company (*b*).

Collaborateurs.

At one period it seemed to have been taken to be law in Scotland, that a company incurred liability for reparation when one of their servants or workmen was injured by the carelessness, ignorance, or *culpa* of another also in their employment (*c*). In this matter the law of Scotland has now been assimilated to that of England, or rather, perhaps, the effects of its own principles have come to be better understood; and it is now settled, that a company is not liable for injuries sustained by one of its servants through the fault of a *collaborateur*, provided the injury did not arise in consequence of failure on the part of the company to do something which by contract, express or implied, between them and the injured party they were bound to do (*d*).

(*a*) *Cockburn* v. *Richardson*, 1820, 1 Bell 474, n. 6; *Williamson* v. *White*, 1810, 15 F. C. 712.

(*b*) *Anderson* v. *Pyper and Co.*, 1820, 2 Mur. 261-271; *Jones and Co.* v. *Ross*, 1830, 8 S. 495; *Rae* v. *Kay*, 1832, 10 S. 303; *Edin. and Glas. Union Canal Co.* v. *Johnston*, 1832, 10 S. 505; *Lyon* v. *Lamb*, 1838, 16 S. 1188; *Finlay* v. *Thompson*, 1842, 4 D. 776; *Weston* v. *Corporation of Tailors*, 1839, 1 D. 1218.

(*c*) *Sword* v. *Cameron*, 1839, 1 D. 493; *Dixon* v. *Ranken*, 1852, 14 D. 420; *Gray* v. *Brassey*, 1852, 15 D. 135; *O'Byrne* v. *Burn*, 1854, 16 D. 1025; *M'Naughton* v. *Caledonian Ra. Co.*, 1857, 19 D. 271.

(*d*) *Reid* v. *Bartonshill Coal Co.*, as revd. 1858, 20 D. (House of Lords) 13, 3 Macq. 266, 30 Jur. 957.

CHAPTER XIV.

EXTINCTION OF COMPANY OBLIGATIONS.

OBLIGATIONS may be extinguished in some one or other of the modes following:—

1. Actual fulfilment;—payment, performance, or satisfaction to the creditor; 2. Virtual fulfilment;—compensation, novation, or confusion; 3. Release;—discharge by the creditor, or by operation of law; 4. Presumed abandonment or satisfaction, including prescription and limitation.

Application to companies.

These modes of extinction apply to company or partnership obligations as well as to those incurred by individuals; but their application to the former class of obligations is often attended by peculiarities arising out of the contract of copartnery which require attention. We shall consider them in their order.

I. ACTUAL FULFILMENT.

Performance.

When the obligation is one *ad factum præstandum*, and it is performed by one of the partners, such performance will release the company *quoad* the creditor; but if it has caused outlay, liability, or loss to the partner, it will in general entitle him to indemnity against the firm.

Payment.

In like manner, payment of a company debt made by a partner extinguishes the obligation in so far as the creditor is concerned, but founds a claim of indemnity at the instance of the partner against the firm, either at common law, or by reason of his having taken an assignation from the creditor whose claim he has paid. The obligation against the company is thus not extinguished, but

transferred from the original obligee to the partner, *minus* the latter's share of contribution (*a*).

Payment by a stranger.

If, again, a stranger, being either an individual or a firm, pay a debt due by a company, the party paying on obtaining an assignation from the creditor comes exactly in his place, and may recover against the company. And this holds good even where a new firm, having succeeded an old in consequence of a change of partners, pays a debt due by the old firm, and so becomes assignee of the original creditor. Here the new firm becomes creditor of the old, and may recover against all who were its partners prior at least to the contraction of the debt (*b*).

Application of Indefinite Payments.

Indefinite payments.

Where a partner makes an indefinite payment from the monies of the firm to a stranger who is creditor both of the firm and of himself as an individual, he will be held to have made such payment on behalf of the firm (*c*). This is a consequence of the common principles of agency (*d*).

Creditor's right of election.

When a payment is made by a debtor, the law generally gives him the right of designating the debt to which he wishes it to be applied; but if he makes the payment indefinitely, the right of appropriating it among the debts as he may see fit is conceded to the creditor (*e*).

Continuous open accounts.

The case is somewhat different when there is a continuous open account between two parties extending over a tract of time, towards which indefinite payments have from time to time been made. Here it would seem equitable to apply the indefinite payments towards extinction of the various items of debt in the order of their dates, beginning at the earliest of the series, without regard to the wishes either of debtor or creditor when they happen to

English law.

differ as to the mode of application. This, which appears to have been always the law of England, and has now been found to be that of Scotland also (*f*), produces, when applied to the case of

(*a*) See Bell's Prin. s. 558; *M'Intyre* v. *Miller*, 13 M. and W. 725.

(*b*) *Lucas* v. *Wilkinson*, 1 H. and N. 420; *M'Intyre* v. *Miller*, 13 M. and W. 725.

(*c*) *Thompson* v. *Brown*, M. and M. 40.

(*d*) Bell's Prin. 559.

(*e*) Ersk. iii. 4, 2.

(*f*) *Per* Lord Cowan in *Lang* v. *Brown*, 1859, 22 D. 113.

firms and companies, consequences of considerable importance, which we shall have to examine somewhat in detail. When so applied, the doctrine in question is known as '*the rule in Clayton's case*,' that having been the first instance of its application to partnership questions.

Rule in *Clayton's* case.

Clayton's case (*a*) was that of a banking company consisting of five partners. One of them, Devaynes, died; and the business was carried on by the surviving partners until they became bankrupt. Clayton, a customer, had an open account with the concern, which was current both during the lifetime of Devaynes and after his death. At Devaynes' death the company were due Clayton a balance of £1713. Subsequently the company both received and paid out monies on Clayton's behalf; and the account current between them was treated not as two separate accounts, one ending on Devaynes' death, and the other beginning from that time, but as being throughout continuous and unbroken. When the bankruptcy took place, it appeared that the company had, after Devaynes' death, and before their bankruptcy, made payments on Clayton's account, which were more than sufficient to extinguish the balance of £1713, but that he had made deposits during the same period to an extent that left a still larger balance in his favour. In these circumstances, Clayton contended that he was entitled to impute the indefinite payments which the bank had made on his account subsequent to Devaynes' death, in extinction of the last-mentioned balance, and proceed against Devaynes' estate for the old balance of £1713. But the Court held that the whole course of dealing both before and after Devaynes' death must be treated as one account, and that the various payments made by the bank must be applied in the order of their dates towards extinction or reduction of the balance due Clayton at each of these dates respectively; so that the balance of £1713 which was due at Devaynes' death having been extinguished by payments made subsequent to that event, Clayton could only claim in the bankruptcy for the new balance which had subsequently arisen.

Extension of rule.

Subsequently many cases occurred where the companies were

(*a*) *Devaynes* v. *Noble*, 1 Mer. 572, 3 Ross Le. Ca. 654, Bell's Illus. 336. In Scotland the rule in *Clayton's* case is sometimes termed the rule in *Devaynes'* case.

general merchants, not mere banking firms, and where the partnership was dissolved not by death, but by retirement (*a*); yet the rule in Clayton's case was equally applied in all.

Statement of rule as applied to companies.

The rule in *Clayton's* case as to extinction of company liabilities by indefinite payments, may therefore now be stated thus. If a customer have an open account with a company upon which both parties are in the practice of operating, by making deposits and honouring drafts, as in the case of banking companies, or by making consignments of goods and partial payments as in the case of ordinary mercantile firms, and on the dissolution of the company the open account is continued unbroken and continuously with their successors, if the balance be found ultimately to be in favour of the customer, he cannot impute indefinite payments on his behalf, whensoever made, during the existence of the new firm, in such a manner as to preserve recourse against the old firm for that part of the account which was incurred during its existence. This rule seems to apply in all cases of dissolution where the business is transferred to a new company or firm; and therefore has place when a partner dies, or retires with due notice, quite as much as when an old firm is entirely broken up and a new firm comes in its place (*b*).

Order of dates.

The principle being that all indefinite payments in accounts current must be applied in the order of their dates, the rule is equally applicable when the company is creditor. Hence the debtor of a company is not entitled at settlement of an account current to insist that such indefinite payments as he has made throughout shall be applied to the later instead of the earlier items, if he should find that mode of application more suitable to his own views (*c*). But, on the other hand, it is equally incompetent for a company to invert the order of apportionment so as to serve its own purposes. Thus, when in an account current between a party and a company, a third party has become surety for a debt which forms an item in the account, the company will not be allowed to impute indefinite payments in extinction of such parts of the account as were not

(*a*) *Brooks* v. *Enderby*, 2 Brod. and Bing. 70; *Simpson* v. *Ingham*, 2 Barn. and Cress. 65; *Pemberton* v. *Oakes*, 4 Russ. 154; *Bodenham* v. *Purchas*, 2 Bar. and Ald. 39, 3 Ross Lc. Ca. 661.

(*b*) *Smith* v. *Wigley*, 3 Moo. and Sc. 174; *Newmarsh* v. *Clay*, 14 East 239.

(*c*) *Beale* v. *Caddick*, 2 H. and N. 326.

covered by the security, if to do this would be to invert or change the natural sequence of the items (*a*).

Rule in *Clayton's* case a mere presumption.

It must, however, be borne in mind that the rule in *Clayton's* case is a mere presumption of law founded on the apparent intention of parties to treat the sequence of transactions between them as one unbroken and continuous whole. If, therefore, the various items do not form one account current, but resolve into distinct accounts, or if it can be shown that it was the intention of parties that they should not be taken as a whole, then the rule in *Clayton's* case will not be held to apply. If, for example, when a change takes place in a company, by death or retirement, the creditor refuses or withholds his consent to his debt being transferred so as to form the first item in his account with the new firm, but keeps in fact his accounts with the two firms distinct, indefinite payments made by the new firm will not be applied to liquidate the debt due by the old (*b*). Even when the account is, *ex facie*, continuous and unbroken, the intention of parties that the rule in *Clayton's* case should not apply, may be proved by facts and circumstances (*c*), and from the representations of the parties made when the payments were received (*d*).

Adoption of this rule in Scotland.

The rule in *Clayton's* case is not in accordance with the older decisions of the Scottish courts, who seem to have gone on the principle that the creditor was in all cases entitled to regulate the application of indefinite payments (*e*). But from the recent decisions, there can remain no doubt that in this matter the law in both countries must now be taken as identical (*f*); and indeed there is great reason to believe that in this, as in many other

(*a*) *Christie* v. *Royal Bank*, 1839, 1 D. 745; aff. 1841, 2 Rob. 118. See also *Allan* v. *Allan and Co.*, 1831, 9 S. 519; *Bodenham* v. *Purchas*, 2 B. and A. 39; *Pemberton* v. *Oakes*, 4 Russ. 154.

(*b*) *Simpson* v. *Ingham*, 2 B. and Cr. 65; *Jones* v. *Maund*, 3 Y. and C. Ex. 347.

(*c*) *Taylor* v. *Kymer*, 3 B. and Add. 320; *Lysaght* v. *Walkers*, 5 Bli. N. S. 1; *Stoveld* v. *Eade*, 4 Bing. 154; *Thompson* v. *Brown*, Moo. and M. 40.

(*d*) *Wickham*, 3 K. and J. 478; *Bannatyne* v. *Brown's Trs.*, 1825, 3 S. 407.

(*e*) *Cochrane and Co.* v. *Mathie*, 1821, 1 S. 82; *Forbes* v. *Innes*, 1739, M. 6813.

(*f*) *Houston's Exec.* v. *Speirs*, 1826, 4 S. 573, reversed 3 W. and S. 392; *Christie* v. *Royal Bank*, 1839, 1 D. 745, aff. 1841, 2 Rob. 118. See pp. 212–13 of the Report, also 3 Ross' Lead. Ca. 668. *Lang* v. *Brown*, 1859, 22 D. 113. See Lord Cowan's judgment, which was that of the Court, and is most exhaustive and instructive.

instances, the laws were always the same when properly understood and applied (*a*).

II. VIRTUAL FULFILMENT.

1. *Compensation.*

As we shall afterwards have occasion to consider the import and effects of this very important doctrine in all its bearings on the partnership relation (*b*), it will be sufficient in this place to indicate the rules which are observed in applying its principles towards extinguishing obligations incurred by a company or firm considered as a separate person.

In Companies and Firms unincorporate.

Firms and common law companies. General rules.

1. When a company is sued by one of its creditors, it may plead compensation on a private debt due by the creditor to one of its partners (*c*), if it have the partners' consent to that effect (*d*).

2. When a partner sues a company creditor for a private debt, he may be met by setting off a debt due by the company to the creditor (*e*).

3. When a concourse of debit and credit takes place between two companies, or between a company and a private person, the same rules as to extinction by compensation have place as would apply if both parties were individuals (*f*).

4. When the rights and obligations of a company have come to centre in a single individual in his private character, and not as trustee for creditors of the former company, or for the representatives of its former partners, compensation has place between debts

(*a*) See *Bannatyne's Reps.* v. *Brown's Trs.*, 1825, 3 S. 407.

(*b*) See chap. on Compensation.

(*c*) *Bogle's Cred.* v. *Ballantyne*, 1793, M. 2581; *Scott and Hall* v. *Bisset*, 1809, 15 F. C. 311; *Russell* v. *M'Nab*, 1824, 3 S. 41; *Salmon* v. *Padon*, 1824, 3 S. 285; *Thomson* v. *Stevenson*, 1855, 17 D. 739.

(*d*) *Thomson* v. *Stevenson*, *supra*; *Raleigh* v. *Hughson*, 1861, 23 D. 352.

(*e*) *Hotchkis* v. *Royal Bank*, 1797, M. 2673, aff. 3 Paton 618.

(*f*) *Inglis and Co.* v. *Cuthbertson*, 1809, Hume 122; *Handyside* v. *Harwood*, 1812, 17 F. C. 29.

which he is due as representing the company, and those in which he is individually creditor (*a*).

In the case of Incorporated Companies.

Corporations. General rules.

1. When a concourse of debit and credit arises between two incorporated companies, or between an incorporated company and an individual, the same rules apply as if both had been individuals.

2. An incorporated company with limited liability cannot set off the claim of one of its shareholders against a company debt, unless it be the special assignee of its shareholder.

The theory and full exposition of these rules will be found in the chapter on Compensation.

2. *Delegation and Novation.*

Delegation and novation.

Delegation is the substitution of a new obligor, novation that of a new obligation, for the old. To the validity of such substitutions the full consent of the creditor is requisite. But it may be implied as well as express, and it is not dependent on the construction of formal documents; it is properly a question for a jury. The law of England appears upon this branch of the subject to be in most cases coincident with our own.

Company obligations are frequently extinguished by delegation.

Substitution of one company for another.

In the first place, the creditor may agree to accept another company as his debtor, in room of the company which originally occupied that position. This will effectually release the latter.

The firm of Somerville and Co. stood indebted to that of Buchanan and Co. Pending this obligation, Somerville and Co. dissolved, the copartnery contract having expired. From that time a new company, viz. Jamieson and Co., which undertook the debts and obligations of the former company, came into existence. The old company differed from the new in this respect, that one partner had retired, and another had been assumed. Soon after, the creditor applied to the new company for payment of the debt; and

(*a*) *Slipper* v. *Stidstone*, 5 T. R. 493; *French* v. *Andrade*, 6 T. R. 582; see also *Golding* v. *Vaughan*, 2 Chitty 436; *Thomson* v. *Stevenson*, 1855, 17 D. 739.

this not being convenient at the time, he ultimately took their bill for the amount. When this bill became due, the acceptors were bankrupt, and the creditor endeavoured to operate payment by proceeding against the old company. In the action no appearance was made for those members of the old company who were also members of the new. Somerville, however, the retiring partner of the old firm, defended, on the ground that *quoad* the old firm, of which he was a partner, the debt was extinguished by delegation; and that he, being a partner only of the old firm, was consequently not liable. The Court sustained the defence (*a*). The late case of *Pearston* v. *Wilson* may also be taken as an example of the application of this principle (*b*).

Substitution of individual for a company.

In like manner, a company or firm may be discharged by the creditors agreeing to accept an individual partner as a substitute for his original debtor, the firm. Of this the case of *Davidson* v. *Ranken* (*c*) may be taken as an illustration. There, the firm of Blyd and Ranken, being indebted to the firm of Davidson and Co., the latter agreed to charge the debt to Blyd's particular account, and advised the firm of Blyd and Ranken of their having done so. Blyd soon after became bankrupt, and Davidson and Co. endeavoured to fall back upon Ranken, as though the obligation against the firm still subsisted. The Court, however, sustained the defence of delegation.

Delegation not presumed.

Inasmuch, however, as delegation is not presumed, it is not every circumstance, or combination of circumstances, that will suffice to prove that a company has been released by the substitution of another debtor. There must have been something done on the part of the creditor which admits of no other construction than that of assent to the delegation. Thus the mere fact that a new company has agreed to receive the assets and pay the debts of a former firm, will not amount to delegation in a question with a creditor who has not acceded in some unmistakeable manner to this arrangement.

The firm of Cuthbert, Mill, and Walker, while apparently

(*a*) *Buchanan* v. *Somerville*, 1779, M. 3402.

(*b*) 1856, 19 D. 197. See also *Hart* v. *Alexander*, 7 C. and P. 746, and 2 M. and W. 484.

(*c*) 1733, M. 7061. See also *Thomson* v. *Percival*, 5 B. and Ad. 925, and *Evans* v. *Drummond*, 4 Esp. 89; *Reid* v. *White*, 5 Esp. 122.

solvent, was dissolved in 1857. A new firm of Mill and Walker was empowered to discharge all debts due to, and to pay all debts due by, the old firm. A bank had discounted for the old firm certain bills, which did not fall due for some months after the dissolution. When they fell due, the acceptors having become bankrupt, the new firm wrote a docquet, dispensing with notice of dishonour; and, at the request of the bank, one of the partners of the new firm adhibited the signature of the old firm. The new firm of Mill and Walker having been sequestrated, recourse was had by the bank upon the estate of Cuthbert, the partner of the old firm, on the ground that that firm had never been discharged. The defence of delegation was set up, but the Court held that it had not taken place, and that the old firm was still liable (*a*).

English law.

The law of England affords numerous illustrations of the same kind. The cases of *Lodge* v. *Dicas* (*b*), *David* v. *Ellice* (*c*), and *Thomas* v. *Shillibeer* (*d*), were instances of dissolution or change of the firm by the retirement of one of the partners; while *Kirwan* v. *Kirwan* (*e*), *Gough* v. *Davies* (*f*), and *Blew* v. *Wyatt* (*g*), were instances of the same change by the retirement of some partners and the introduction of others. In all these cases, the circumstances were very strong in favour of the view that substitution of one firm for the other had taken place, so as to release the old firm; yet the English courts refused to give effect to this defence, on the ground that the matter was not beyond doubt.

It should be noticed, however, that if the cases of *Lodge* v. *Dicas* and *David* v. *Ellice* had occurred in Scotland, the finding would probably have been for delegation. The English court went greatly on the technical rule of that law, that the agreement to accept the new firm in room of the old was void for want of consideration, even if it were otherwise established. Now this rule is not observed in the law of Scotland; and by a late decision

(*a*) *Muir* v. *Dickson*, 1860, 22 D. 1070. See also *Milliken* v. *Love*, 1803, Hume 754; *Campbell* v. *Cruickshank*, 1845, 7 D. 548.

(*b*) 3 B. and Al. 611.

(*c*) 5 B. and C. 196.

(*d*) 1 M. and W. 124.

(*e*) 2 Cr. and M. 617.

(*f*) 4 Price 200.

(*g*) 5 Car. and Pa. 397. See also *Harris* v. *Farwell*, 15 Beav. 31; and *Daniel* v. *Cross*, 3 Ves. 277.

in England, it would seem that in future it will not be held to operate in questions of this nature (*a*).

Additional security differs from delegation.

Care must be taken not to confound a mere agreement to accept of further security with a consent to delegation. Thus a creditor may be induced to give delay, in consequence of obtaining the security of a new firm; and if in such a case he afterwards takes proceedings against the new firm, it cannot be said that he has thereby waived his claim against the old (*b*). Nor does the taking a bill from a partner for a company debt *per se* infer delegation, so as to release the firm (*c*).

One firm succeeding another.

When one firm is succeeded by another, and the new company contains members who were also members of the old, the mere fact of the creditor taking proceedings against these persons for recovery of his debt is no proof that he had adopted the new firm as his debtor, so as to release the old; for he was entitled to go against such persons in their character of partners of the old firm, irrespective altogether of the relation they had contracted with the new company (*d*).

English cases.

In some English cases, where the creditor was proved to have been aware of an agreement between an old firm and a new, that the latter should take the assets and liabilities of the former, the elapse of many years, during which he had taken no steps to recover as against the old firm, but had received payment of interest arising on his debt from the new company, has been held to infer his assent to delegation (*e*).

Corporations.

The same rules apply to companies incorporated by special act, charter, or registration (*f*), except in so far as their constitution may render adoption of the liabilities of another company invalid.

Effects of amalgamation.

It may be observed, that the amalgamation of two companies with each other does not produce delegation so as to release former shareholders of one of the amalgamating companies. It is very

(*a*) *Lyth* v. *Ault*, 7 Ex. 669.

(*b*) *Thompson* v. *Percival*, 5 B. and Ad. 925; *David* v. *Ellice*, 5 B. and C. 196; *Heath* v. *Percival*, 1 P. W. 682.

(*c*) *Wilson and Corse* v. *Gardiner*, 1807, Hume 247; *Bedford* v. *Deakin*, 2 B. and Al. 210; *Spencely* v. *Greenwood*, 1 Fos. and Fin. 297.

(*d*) *Buchanan* v. *Adam*, 1833, 11 S. 762. See also *Percival* v. *Heath*, 1 P. W. 682; *Milliken* v. *Love*, 1803, Hume 754.

(*e*) *Brown* v. *Gordon*, 16 Beav. 302; *Oakley* v. *Pasheller*, 4 Cl. and Fin. 207; *Rodgers* v. *Maw*, 4 Dowl. and L. 66.

(*f*) See *Saxon Life Assurance Society*, 2 J. and H. 408.

doubtful whether it even gives the creditor the benefit of additional security (*a*).

Merger.

There are cases to be found in the English authorities in which '*merger*' (a species of novation) has been found to cancel a company obligation by substituting another in its place, and that without any formal consent on the part of the creditor, but by the mere operation of law, in virtue of a principle peculiar to the English system. According to the law of England, if a creditor obtain an obligation of a higher order than he had before, the original obligation is lost or merged in the new. Thus, if a company or firm incurs an obligation by simple contract, and one of the partners grants his bond for the debt, this at once releases the other partners; and, in like manner, it is held that if the creditor obtains judgment against one of the partners only, his doing so destroys *ipso facto* his recourse against the others (*b*). In such cases, merger results from the simple fact of accepting the bond or obtaining the judgment. It is said that in equity this principle is not so strictly enforced.

Does not obtain in Scotland.

No such principle as this ever obtained in the law of Scotland; but the new obligation has always (unless the contrary was expressly stipulated) been held merely corroborative of the old (*c*). It is important to bear this difference between the two legal systems in mind, for otherwise a very erroneous inference might be drawn from numerous English decisions of which the doctrine of merger is the true *ratio*.

III. RELEASE—DISCHARGE BY CREDITOR, AND BY OPERATION OF LAW.

Discharge by creditor.

If a creditor chooses to discharge his debtor or obligant, the release will be effectual, provided the fact can be established by legal evidence, whatever may have been the motive upon which the creditor acted; and as to the kind of evidence which the law requires to establish a discharge, the same rules generally apply in

(*a*) Previous case; and see *Hardinge* v. *Webster*, 1 Dr. and Sm. 101.

(*b*) *Basset* v. *Wood*, 11 Vin. Ab. Exting. B. 8; *King* v. *Hoare*, 13 M. and W. 494. See Lindley, p. 367, and Sup. 78.

(*c*) Ersk. iii. 4, 22; M. 11518.

the case of firms and companies as in that of individuals, and will be found in any work on evidence. When the discharge is required by law to be in writing, if the creditor be a copartnery, attention must be paid to the mode in which the firm signs obligations; if it be an incorporated company, regard must be had to the forms laid down in its instrument of incorporation for this purpose. The modes in which company debtors may be effectually discharged will be afterwards more fully considered.

English doctrine as to release by one partner.

There is a doctrine of English law, as to the effect which the release of one partner has to release the others, or, in other words, to terminate the company obligation, which it is here necessary to consider, as some doubts have been entertained whether it was not, or at least has not now become, law in Scotland. According to the law of England, an absolute and unconditional release of a company obligation to one partner operates as a discharge to all the partners (*a*).

This rule is, however, subject to certain limitations. In the first place, it is held that if it be expressly set forth in the release that it shall be limited to the benefit of the releasee, and shall not avail, even in his case, when he is sued jointly with his co-obligants, then it will not bar action against the company. Further, a distinction is made between a release and a covenant not to sue, so that when the latter is made with one partner, it would seem not to liberate the others (*b*). But it has also been held, that if a creditor obtains judgment against the partners of a firm for a company debt, and arrests them, and then lets one of them go, the others are entitled to be discharged from custody (*c*).

Is this the law of Scotland?

The author has been unable to discover any express authority or *dictum* upon this question in the Scottish authorities; yet it would seem never to have been doubted that in our law the discharge of one partner does not operate as a release to the others. And if we attend to the origin of the English rule, it would appear to follow that the Scottish rule must always have been different.

The English rule is nothing else than the application to part-

(*a*) *Bower* v. *Swadlin*, 1 Atk. 294; *Cheetham* v. *Ward*, 1 Bos. and P. 630. See also Lindley 350, and Collyer 428.

(*b*) *Solly* v. *Forbes*, 2 Brod. and Bing. 38; *Price* v. *Barker*, 4 E. and B. 760; *Lacy* v. *Kinaston*, 1 Lord Raymond 690; *Hutton* v. *Eyre*, 6 Taunt. 289; *Clayton* v. *Kynaston*, 2 Salk. 573.

(*c*) *Ballam* v. *Price*, 2 Moo. 235.

nership of the old doctrine of the common law, that where several persons are bound jointly, or jointly and severally, whether as principals or sureties, a release to one is a release to all (*a*). Now the law of Scotland upon this matter was always different. The discharge of one co-obligant had no effect to release the others, whether they were bound jointly, or jointly and severally (*b*); and the same rule formerly held good as to cautioners, except in so far as a discharge of one of them diminished the claim against the others to the extent of his share of the obligation (*c*). It must also be borne in mind, that in another respect the reason of the English rule fails when applied in cases of Scotch partnership. Company obligations are not in Scotland the joint and several obligations of the individual partners, but the obligations of the *quasi* person of the firm of which the partners are the guarantees. It may perhaps be argued that the recent alteration of the law of Scotland, whereby a discharge to one cautioner is now declared to be a discharge to all (*d*), has by implication introduced the English rule into our partnership law. But it must be observed that this enactment plainly applies to persons bound as cautioners *eo nomine*, and not to guarantees becoming such by implication of law. It would therefore seem that, according to the principles of the law of Scotland, a discharge to one partner is not a discharge to all; and that the utmost effect which such a release could operate, would be to limit the obligation of the other partners by the amount of the contribution which would otherwise have been exigible from the partner obtaining the discharge.

Release by operation of law.

Sometimes an obligor finds himself released from his obligation by the operation of law, without having himself done anything to contribute to that result. An instance of this has been introduced by the recent Mercantile Law (Scotland) Amendment Act (*e*), which it is of importance to notice, as it has a very important bearing on the obligations of guarantee societies. Sec. 7 of this statute is as follows: 'No guarantee, security, cautionary obligation, representation, or assurance granted or made after the passing of this

(*a*) *Ex parte Slater*, 6 Ves. 146; Watson on Part. 227; Collyer 428; Lindley 350.

(*b*) Second Mercantile Report Law Commission, 91.

(*c*) Bankt. i. 24, 2; Sh. Bell's Com. 277; Ersk. iii. 3, 68.

(*d*) 19 and 20 Vict. c. 60, s. 9.

(*e*) 19 and 20 Vict. c. 60.

Act to or for a company or firm consisting of two or more persons, or to or for a single person trading under the name of a firm, shall be binding on the granter or maker of the same, in respect of anything done or omitted to be done after a change shall have taken place in one or more of the partners of the company or firm to which the same has been granted or made, unless the intention of the parties that such guarantee, security, cautionary obligation, representation, or assurance shall continue to be binding, notwithstanding such change, shall appear, either by express stipulation or by necessary implication, from the nature of the firm or otherwise.'

Discharge of one partner in cautionary obligations.

The provisions of sec. 9 also deserve attention. They are as follows: 'From and after the passing of this Act, where two or more parties shall become bound as cautioners for any debtor, any discharge granted by the creditor in such debt or obligation to any one of such cautioners shall be deemed and taken to be a discharge granted to all the cautioners; but nothing herein contained shall be deemed to extend to the case of a cautioner consenting to the discharge of a co-cautioner who may become bankrupt.'

This enactment is, in fact, an extension to the case of Scotch co-cautioners of the well-known rule of the English common law, that the release of one of several co-obligors is a release to all (*a*). What effect it may be held to have in the case of Scotch firms or unincorporated companies which have undertaken cautionary obligations, is a question by no means free from difficulties. If the old Scottish doctrine, that the firm is a *quasi person*, distinct from the members of which it is composed, be maintained in its entirety, it may perhaps be successfully argued, that as regards firms and companies the provision has no application; for, according to the rigour of this doctrine, it is the *quasi* person of the firm, and not its members, which is the true obligant in the case supposed. It is by no means certain, however, that this doctrine, whose ancient rigour has been in modern times greatly abated, could be relied on as sufficient to shut out what appears to be the plain intendment of the Legislature. Much may perhaps depend on the form of the instrument creating the cautionary obligation. If the members of the firm, as is generally the case, are taken bound individually and *nominatim*,

(*a*) Coke on Lit. 232, a. This is also true of sec. 7. *Bodenham* v. *Purchas*, 2 B. and Al. 39, 3 Ross Leading Cases 661.

there is reason to believe that the statutory provision will apply, so that what is intended to add to the stringency of the contract may be found to avoid the obligation altogether.

IV. PRESUMED ABANDONMENT OR SATISFACTION.

Prescription or Limitation.

Distinction between.

These terms are generally used as convertible, but a distinction is sometimes made as follows:—Prescription is said to extinguish the debt in virtue of a legal presumption that it has been paid or abandoned; whereas limitation is said not to affect the actual subsistence of the debt, but after a certain time to bar action on the instrument or document by which the debt is evidenced. Perhaps more importance has been attached to this distinction than it deserves; but be that as it may, it does not appear to be of much consequence in questions of partnership law.

Different kinds of prescription.

The law of Scotland recognises a great number of prescriptions or limitations; but to many of these it is unnecessary here to refer, as they have little or no application to the partnership relation, or if they have, do not operate differently in it from what they would do in the case of individuals. There are some prescriptions, however, that raise difficult questions in the case of firms and companies, and which will therefore require to be considered in this part of the treatise. These are the triennial, the quinquennial, and the sexennial. Their effect is to raise a legal presumption that the debt has been paid or the claim abandoned; but this presumption may be elided by proceedings, on the part of the creditor, during the prescriptive period, to constitute the obligation; and even after the elapse of that time, the subsistence of the debt may always be proved by the writ or oath of the debtor.

Effects of prescription.

Application of doctrine to companies. Writ or oath.

In considering how these principles apply in the case of firms and companies, it must be observed at the outset, that in the case of *correi debendi*, and of persons bound jointly and severally for a debt or obligation, the law is settled that neither the writ nor the oath of one or more of them will prove the subsistence of the debt or obligation against the others after the elapse of the prescriptive

period (*a*). To produce this effect, the writ or oath must be those of the whole number. The reason of this is obvious. Although joint-obligants, they are not mutual agents for each other, and have therefore no authority either express or implied to bind each other. Besides, since the law requires the writ or oath of the debtor, it is plain that this can only be satisfied by the joint writ or the deposition of all.

Difference between co-obligants and partners.

Now, the case of partners differs from that of co-obligants in this respect, that partners are, within the limits of the company business, agents for each other. But this agency terminates as regards the public as soon as a dissolution properly notified has taken place. After that event, therefore, the former partners stand to each other merely as co-obligants in relation to subsisting company obligations; and they should therefore have no power to bind each other in either of the ways mentioned. It would accordingly seem to have become settled law, that after dissolution properly notified to the creditor, a reference to the oath of one of the partners is incompetent; and that the reference must be made to the oaths of all the former copartners (*b*).

Writ or oath *stante societate.*

The question is somewhat different when it is asked, whether during the subsistence of the partnership a reference of resting owing of a company obligation can be made to one of the copartners so as to elide prescription. It does not appear that the question in its pure form has ever presented itself for decision. But here also the theory of law as well as practical considerations would seem to indicate a negative answer.

It is no doubt true, that until dissolution the mutual agency between the partners continues; and in so far as that is concerned, their position is different from that of *correi debendi*. But it seems very certain that the matter in question does not fall within the limits of implied agency. The law gives the creditor the right to refer the question of resting owing to the oath of the debtor only, not to that of the debtor's agent; and therefore if a reference to the oath of the

(*a*) *Allan* v. *Ormiston*, 1816, 3 S. 208, note, and Hume 477; *M'Indoe* v. *Frame*, 1824, 3 S. 207; *Houston* v. *Yuill*, 1822, 1 S. 417, 20 F. C. 614; *M'Neill* v. *Blair*, 1823, 2 S. 155; *Laidlaw* v. *Hamilton*, 1826, 4 S. 644.

(*b*) *M'Nab* v. *Lockhart*, 1843, 5 D. 1014, specially the opinion of Lord Medwyn, p. 1020; *Nisbet's Trustees*, 1829, 7 S. 307; *Easton* v. *Johnston*, 1831, 9 S. 440. See *Stewart* v. *Stewart*, 1823, 2 S. 558; *Mill and Co.* v. *Campbell and Hopkirk*, 1849, 11 D. 979, and 1850, 12 D. 618.

agent is competent, it can be so only in virtue of some very special contract to that effect, and one sufficient to take the case out of the operation of the statute. Now it cannot be said, that by entering a company or firm a man makes a contract with all who may chance to be its creditors—that he is to be bound in questions of this kind by the oaths of its agents, viz. his copartners. No doubt when every partner depones, the joint deposition of all must be taken as the oath of the company; but that does not arise from their being the company's agents to that effect, but from the fact that, taken together, they really constitute the company. Furthermore, it must be observed, that the question referred in these cases of prescription to the oath of the debtor, is not merely the constitution of the debt, but the fact of its subsistence. Now, as any one of the partners is entitled to make payment of a company debt in whole or in part, and may in the hurry of business, or even from improper motives, have concealed his having done so from his copartners, it is impossible to ascertain whether payment has not been made without examining all the partners. If, indeed, the effect of the prescription could be elided by the oath of one or more partners chosen by the creditor, he might perpetrate a gross fraud on the concern, by selecting such partners as referees as he knew were in ignorance of payment having been made; and it is even conceivable that a pretended creditor might collude with some of the partners for this purpose (*a*). *E converso* a creditor is not limited to the oath of one partner (*b*).

Managing partner.

Where the entire management of the business of a firm is entrusted to one partner, his oath will be taken to be that of the firm; and the same holds true of the managers or other officials in joint-stock or incorporated companies as to all transactions within the sphere of their management. In such cases, the only proper person to whose oath a reference should be made, would seem to be the official who is charged with that part of the business to which

(*a*) See *Gilmour* v. *Stewart's Representatives*, 1797, M. 12042. See opinions of judges in *Nisbet's Trustees*, 1829, 7 S. 310, and also in *Duncan* v. *Forbes*, 1829, 7 S. 821. See also *per* Lord Justice-Clerk in *M'Nab* v. *Lockhart*, 1843, 5 D. 1021; *Cleland* v. *M'Cleland*, 1851, 13 D. 504. See *Kerr* v. *Bryson*, 1747, M. 14567. See Dickson on Evidence, secs. 1572 *et seq.*; and *per* Lord Justice-Clerk in *Brown* v. *Edgley*, 1843, 5 D. 1014.

(*b*) *Berrys* v. *Wight*, 1822, 1 S. 402.

the particular transaction belongs. Where this department of the business is committed to several persons, such as a board of directors, the oaths of all should in general be taken (*a*).

When the reference has been made to the oaths of all the partners, it will not be held to be exhausted by the deposition of one of them (*b*). Yet, on a reference to the oath of two partners as to certain facts respecting a bond due to one of them only by name, but alleged to be for the firm, it was held competent to take the oath of only the creditor named, the other partner being abroad (*c*).

Writ of single partner.

The same observations would seem to apply generally to the writ of partners less than the whole number; and the following remarks may also be noted in addition. If during the continuance of the copartnery one of the partners execute a writing which is properly a renewal of an old by the creation of a new obligation, it will bind the firm after the original obligation has undergone prescription; for this is not to be taken as an acknowledgment of a subsisting debt, but as an exercise of the institorial power to bind the firm by contract (*d*). If, again, a partner retires from a firm, while certain company debts remain unpaid, the writ of the remaining partners would seem sufficient to elide prescription not only as against themselves who continue to carry on business, but as against the retiring partner: for it must be presumed, that when he left the concern he empowered the remaining partners to transact for him in relation to unpaid company obligations; and it cannot be supposed that he had himself paid such obligations, seeing he had ceased to take any share in the management (*e*).

Writ of directors.

In like manner, the writ of the managing partner of a firm, or the writ of the board of directors or other officials of a company, ought to be taken as the writ of the concern so as to interrupt prescription, for such officials are in reality their factors specially appointed (*f*).

(*a*) See *per* Lord Medwyn in *M'Nab* v. *Lockhart*, 1843, 5 D. 1020; *Gow* v. *M'Donald*, 1827, 5 S. 445; *M'Gregor* v. *M'Gregor*, 1860, 22 D. 1264; *Campbell* v. *Ballantyne*, 1839, 1 D. 1061; *Kendal* v. *Campbell*, 1766, M. 12351. See *Duncan* v. *Forbes*, 1831, 9 S. 540; *Fleming* v. *Ballantyne*, 1840, 3 D. 242.

(*b*) *Cleland* v. *M'Cleland*, *supra*.

(*c*) *Earl of Traquair* v. *Burrows*, 1815, 6 Paton's App. 99, affirming judgment of the Court of Session, which is not reported.

(*d*) See *Treacher* v. *Galloway*, 1844, 17 Jur. 55.

(*e*) *Milliken* v. *Love*, 1803, Hume 754.

(*f*) *Per* Lord Medwyn in *M'Nab* v.

Company books.

The books of the firm or company have always been regarded as the writ of the concern in questions of this kind; and entries found in them will bind the company, unless forgery can be established (*a*). The writ or oath of a surviving partner is in general to be taken as that of the copartnery (*b*).

Interruption of prescription.

The currency of all prescriptions may be interrupted by action; but in the case of partnership, it would seem that the proceedings must be taken against the company as such, and not merely against a partner individually. In the case of *Grant* v. *The Creditors of the York Buildings Company* (*c*), a claim having been lodged on the company's estate, it was objected to on the ground that it had undergone the long negative prescription, and that a summons, decree, and horning which were relied on as interrupting prescription were inept, because these had been directed not against the company in the corporate name, under which by its special act it was entitled to sue and be sued, nor even against the directors, who subscribed the contract, but against the governor and directors at the date of the action, some of whom had ceased to hold office before the horning was given. The Court of Session held, by a majority, that the intimation thereby given to one or more of the partners was effectual to save the debt from prescription. On appeal, however, the House of Lords remitted to reconsider the question, but the matter was finally compromised without being judicially determined (*d*).

English law.

In this department of partnership law, little assistance can be obtained from the law of England,—the late Mercantile Law Amendment Act, 19 and 20 Vict. c. 97, which does not apply to Scotland, having introduced certain special provisions by which the old rules as to 'limitations' have been greatly modified. The previous law was, however, in principle at least, not materially different from our own. It may be seen by referring to Collyer, p. 282; Lindley, p. 370; and Story on Partnership, sec. 324.

Lockhart, 1843, 5 D. 1020; *Smith* v. *Falconer*, 1831, 9 S. 474. See also *Gow* v. *Macdonald*, 1827, 5 S. 445.

(*a*) *Leslie* v. *Magistrates of Brechin*, 1808, 15 F. C. 2; *Muirhead* v. *Town of Haddington*, 1748, M. 2507; *Buchanan* v. *Magistrates of Dunfermline*, 1828, 7 S. 35; *Ker* v. *Magistrates of Kirkwall*, 1827, 5 S. 802. See Admissions; Dickson on Evidence, 509 *et seq.* and 1465.

(*b*) *Fyfe* v. *Carfrae*, 1841, 4 D. 152.

(*c*) 1784, M. 11283.

(*d*) 3 Paton's App. 17 (1785). See M. 11285.

CHAPTER XV.

LIABILITIES OF PARTNERS AND SHAREHOLDERS FOR THE COMPANY OBLIGATIONS.

Advantages of a correct theory.

THE numerous and important questions which present themselves in this branch of partnership law render it extremely desirable that some consistent and easily intelligible theory should be adopted by which they might be solved, and to which all the principles found in operation might be referred. Many difficulties, however, beset the evolution of such a theory. The partnership relation embraces the elements and principles of many other contracts; the legal notion of the firm presents important differences in different systems of law; and it cannot be said that the decisions of the courts have been characterized by unbroken uniformity. It is therefore very doubtful whether, in the absence of a code, any theory of partnership liabilities can be constructed which shall in all cases afford a safe and unerring guide. At the same time, much will have been gained if a theory can be formed which harmonizes with the genius of the legal system to which it is applied, explains the authorities consistently with each other, and thus serves to indicate what is likely to be the view which the courts will adopt in dealing with questions not hitherto determined.

English theory.

According to the theory of the law of England, in so far as any consistent theory can yet be taken as evolved in that system, the liabilities of partners for the company debts and obligations is said to arise out of the doctrine, that they are agents and sureties mutually for each other within the company's sphere of action; so that as each may bind all, each is liable for the debts and obligations of all. Such a theory is the only one perhaps that can be adopted in a system which ignores the *quasi persona* of the firm;

but although it is capable of being reasoned out to equitable results, it labours under the great disadvantage of being cumbrous and embarrassing in practical operation.

Scottish theory.

The law of Scotland in all probability adopts the same principles of agency and suretyship; but inasmuch as it recognises the separate *quasi persona* of the firm, it is capable of finding expression in a theory less cumbrous and more easy of application. According to our system, the partners are agents and sureties, not of each other, but of the firm; and the obligations which it contracts by means of their agency bind them individually as its sureties.

The Scottish theory is that applicable to incorporate associations in both systems, with this qualification, that in incorporated associations the guarantee of the shareholders is generally, though not always, restricted within definite limits.

General similarity of practical results.

But whichever of the two theories be adopted, the practical results appear to be the same; and therefore the English decisions on the subject of the liabilities of partners, though not to be taken as decisive, ought to receive great weight in discussing such questions as have not yet received an authoritative solution by our tribunals.

General rules.

Once an obligation has been validly incurred by the company or firm, it may, after being constituted against the concern, be enforced against the members as guarantees bound conjunctly and severally with their principal. When the obligation is *ad factum præstandum*, and can be performed by another, specific performance may be decreed against all or some of the partners. When, again, the firm ought as a person to perform the act, or where performance becomes impossible, damages will be awarded instead of specific performance. An obligation to abstain from acting when that is the nature of the obligation, may be enforced by interdict, as in England, by injunction.

Whenever decree has been obtained against the firm, any one of the partners may, at the option of the creditor, be proceeded against for the whole amount of debt or damage decerned for, leaving him to find indemnity against his copartners as best he may (*a*). And any one of the partners may be charged on decree or diligence directed against the firm (*b*).

(*a*) See Contribution and Indemnity, and Diligence. (*b*) See Diligence.

UNLIMITED LIABILITY OF PARTNERS AND SHAREHOLDERS IN FIRMS AND UNINCORPORATED ASSOCIATIONS.

No principle can be said to be better fixed in the laws both of Scotland and England, than the doctrine that every partner of a private firm, and every shareholder of an unincorporated association, incurs unlimited liability to the public for all the debts and obligations of the company.

Ancient Scottish law.

It has sometimes been thought that the common law of Scotland was originally different from that of England in this respect, and that it recognised a power in trading associations other than such as were incorporate by charter or special act, to limit the liability of their members to the subscribed capital, or even to the amount of their respective shares, after the fashion of the *sociétés en commandite* of French law. This opinion does not appear to be altogether without foundation. The old Scotch law of society was borrowed more from continental than from English sources; and as it formerly gave great prominence to the *quasi* person of the company, it is not improbable that principles analogous to those of the foreign *sociétés en commandite* were finding their way into this country, and might ultimately have become settled law had it not been for the infiltration of rules and precedents of English growth.

This view receives countenance from the *dictum* of Lord Kilkerran, which has not a little embarrassed modern jurists, that the creditor of a company 'cannot pursue one of the partners for a company debt: his action lies against the company only' (*a*); and also from the circumstance that, in the case of *Stevenson and Co.* v. *Macnair*, where the defence was stated that the contract limited the responsibility of each partner to his own share, the Court waived deciding on that point, but sustained the other defences (*b*).

Adoption of English rule.

But be this as it may, there is no doubt that the English rule of unlimited liability has long been fixed as the law of Scotland. In the case of *Douglas, Heron, and Co.* v. *Hair* (*c*), where every available plea seems to have been stated to save from ruinous liability, the plea of limited responsibility was not again raised; and

(*a*) 1741, Kilk. 518. (*b*) 1757, 2 F. C. 92, M. 14560 and 14667.
(*c*) 1778, 8 F. C. 57, M. 14605.

since that period numerous cases have occurred in which such a plea, if tenable, would undoubtedly have been urged. It would seem therefore that the principles of *sociétés en commandite*, if they ever obtained a footing in this country, have long since been abandoned.

In England, it appears that unlimited liability was always the rule. So much was this the case, that, as far back as 1719, the celebrated *Bubble Act* (*a*) declares the holding out of an assurance of limited liability to be a distinguishing mark of an illegal association. On many occasions the inflexible nature of this doctrine has been laid down from the bench, and the cases are numerous where it has formed the *ratio decidendi* (*b*).

Devices to attain limited liability.

The extreme hardship which its application to large trading associations has entailed on the mercantile community, has eventually led to the restrictive provisions of the Registration Acts. But long before the Legislature thought fit to interfere, numerous attempts were made to evade the common law, and reduce the liabilities of shareholders within stricter limits. Such devices, since the Act of 1862 has brought limited liability within the reach of all companies consisting of more than six persons, are of less importance; but they may here be briefly noticed, as, until the registration principle is extended to private firms, attempts will always continue to be made to escape from the unlimited liability of the common law.

Principle of.

These devices all depend for success on the principle that it is competent for those dealing with a firm to release the partners from unlimited liability, in so far as the transactions of the firm with them are concerned. And the most common form in which this principle is sought to be rendered available, is that of stipulating with the creditor that he must look to the funds of the company only for payment, and shall have no claim beyond its subscribed capital. If an agreement of this kind can be satisfactorily established, limited liability as to such transactions as are covered by the agreement may be attained; yet the *onus probandi* will rest on the company or partner seeking to found on it as a defence.

But as it is evident that the success of such schemes to attain

(*a*) 6 Geo. I. c. 18, s. 18.

(*b*) *R.* v. *Dodd*, 9 East 516; *Keasley* v. *Codd*, 2 Car. and Pa. 408; *Greenwood*, 3 De G. M. and G. 459.

limited liability turns solely on the validity of the special contract to shut out the operation of the common law, the special contract must fully cover the transaction or series of transactions it is intended to affect; and it must be stipulated that the funds of the company as contradistinguished from the separate estate of the individual partners, or better still, some specified fund, shall alone be answerable, otherwise the contract may be held to mean nothing more than an affirmance of the common law, which holds the members to be jointly and severally liable for the company obligations (*a*).

When limited liability is attained in this manner, a court of equity, while giving effect to the special contract, will require the shareholders to pay up so much of the guaranteed capital as has not yet been subscribed (*b*).

The question here under consideration does not appear, so far as the author is aware, to have come as yet under consideration of the Scotch courts; but if it did, there seems no reason to doubt that effect would be given to the principles of the English decisions, and this all the more readily that the foundation for its application seems already to be laid in the recognition of the company's separate *persona*.

Application of the doctrine of liability from sharing profits.

In an early part of the present treatise we endeavoured to explain the well-known doctrine, whereby a person, though entitled to none of the rights and privileges of a partner, has been held to have incurred all the responsibilities of that relation in a question with the public, by the mere fact of his having participated in the profits. Thus it has been held, that money could not be advanced to a trader on condition of receiving part of the profits as interest without the risk of rendering the lender liable as a partner; that servants or agents receiving salaries which in any way varied with the returns of the business were in a similar position; and that any one receiving an annuity out of the profits was in danger of incurring liability for all the obligations of the concern (*c*). The extent to

(*a*) See the following English cases: *Hallett* v. *Dowdall*, 18 Q. B. 2; *Hancock* v. *Hodgson*, 4 Bing. 269; *Durham's* case, 4 K. and J. 517; *Halkett* v. *Mer. Trades Association*, 13 Q. B. 960; *Worcester Corn Ex. Co.*, 3 De G. M. and G. 180; *Hassell*, 4 Ex. 525; *Athenæum Life Soc.*, 1 Johns. 80. See Lindley 304.

(*b*) *Talbot's* case, 5 De G. and Sm. 386. See Lindley 305.

(*c*) See p. 53 and p. 47.

which this doctrine was carried in some of the earlier cases produced very great hardship, if not absolute injustice; and as the liability thus incurred was unlimited, there can be no doubt that it operated most unfavourably as a check on commercial enterprise. These consequences of the doctrine, though not probably foreseen when it was first adopted by the courts, speedily made themselves apparent, and endeavours were made to obviate them by drawing a distinction between 'nett profits' and 'gross returns;' but it was soon found that this distinction, which Lord Eldon characterized as 'extremely thin,' laboured under the serious disadvantage of being unintelligible to the great mass of the mercantile community for whose benefit it was introduced. The truth is, the doctrine itself, as commonly received and expressed, was radically unsound, and could never be relied on as a safe principle for decision. The right to share profits is not the reason of a partner's liability for company obligations; but both the right and the liability are equally consequences, as they are indications, of the existence of partnership. By degrees, as the principles of commercial law were more fully elaborated, this came to be better understood; and as the existence of agency, express or implied, between the firm and an alleged partner came to be recognised as the most trustworthy test of the partnership relation, the old doctrine of liability from participating in profits was gradually circumscribed in its operation, and was expressed in a less questionable form.* There is even reason to believe that it would have been ultimately banished from the law in its more objectionable sense, or that at any rate the inequitable principles to which it had given rise would have been abandoned, without the intervention of the Legislature. While, however, the present treatise was going through the press, and after the earlier chapters had already been printed off, an Act was passed, which, though very far from supplying a remedy commensurate with the imperfections of the existing law applicable to private partnership, has at least the merit of removing or palliating some of the more glaring evils which the doctrine in question had been the means of introducing.

Act of 1865.

The provisions of this Act (28 and 29 Vict. c. 86) (*a*) are as follows:—In the first place, it declares that the advance of money by way of loan to a person engaged in any trade or under-

Sharing of profits by lenders and vendors of goodwill.

(*a*) Passed 5th July 1865.

taking, on a *written* contract that the lender shall receive a rate of interest varying with the profits, or a share of the profits themselves, shall not of itself constitute him a partner, or render him responsible as such (sec. 1); and it further declares that the mere receiving by way of annuity or otherwise of a share of the profits of a business in consideration of the sale of its goodwill shall not render the receiver a partner with, or responsible for, the liabilities of the person carrying on such business (sec. 4).

Provision in lieu of registration.

These provisions appear to remove the worst consequences of the old state of the law; but it is obvious that if they stood alone, they would enable unprincipled persons to collude with a firm or an individual trader, so as, under the pretext of participating in profits, to appropriate the only fund available for payment of *bona fide* creditors. The true safeguard against such abuses would seem to lie in the extension of the principle of registration to ordinary firms. This method, however, has not been adopted; but the Act endeavours to meet the difficulty by declaring that in the event of the trader becoming bankrupt, taking the benefit of any act for the relief of insolvent debtors, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying insolvent, lenders under its provisions shall not be entitled to recover any portion of their principal, or of the profits, or interest payable thereon; and vendors of the goodwill of a business, under sec. 4, shall not be entitled to recover any share of profits, until the claims of the other creditors have been satisfied (sec. 5).

Agents and annuitants participating in profits.

By sec. 2 it is declared that no contract for the remuneration of a servant or agent by a share of the profits shall of itself render him responsible as a partner, or give him the rights as a partner with his employer; and sec. 3 provides that no widow or child of the deceased partner of a trader receiving by way of annuity a portion of the profits made by such trader in his business, shall by reason only of such receipt be deemed a partner of or subject to the liabilities of such trader.

Definition of person.

Lastly, by sec. 6 the word 'person' as used in the Act is declared to include a partnership firm and joint-stock company, and a corporation.

Observations.

In perusing this Act the following observations suggest themselves:—It is noticeable, in the first place, that it contains no-

thing to detract from the power which previously existed under the old law, to make advances to a firm or company in such a way that the lender should stand to it as an ordinary creditor, without either incurring the liabilities of *quasi* partnership, or having the debt postponed in a question with other creditors. If, therefore, a man chooses to make a loan to a firm, in consideration of receiving a fixed rate of interest instead of a return varying with the profits, he will now, as formerly, be entitled to all the privileges of an ordinary creditor. What the Act does is merely to enable a lender to receive a rate of interest varying with the profits, without thereby incurring the responsibilities of *quasi* partnership; but it couples this with the condition that, in such a case, his claims to repayment, either of principal or interest, shall be postponed to those of other creditors who are not entitled to share profits. It is very questionable, however, how far this provision will be taken advantage of in practice. For it is to be observed, 1. That as the lender is expressly declared not to be a partner, he has no right to take an active share in the concern, so as to ensure its being properly carried on, and he may even find it difficult to ascertain with accuracy what amount of profits are *de facto* realized; and, 2. That if, from reckless or even fraudulent management, the concern should become bankrupt, his chance of payment may be entirely illusory. Persons lending money on such conditions are in fact most unfavourably situated; they are very much at the mercy of the borrower, having neither the full privileges of partners nor the full rights of creditors. The provision as to the remuneration of agents and servants, and that as to annuities to the widow and children of a deceased trader, are eminently beneficial; but the former, it may be observed, is little more than an affirmance of what was perhaps always law in Scotland. The declaration, that the word 'person' shall include firms, companies, and corporations, gives the Act a very wide application; but, on the other hand, it may be questioned whether the use of the words 'trader' and 'trade' throughout the Act, will not have the effect of restricting, in some respect, the benefit of its provisions within what would have been the case if it had been declared to apply to all undertakings for the purpose of gain, as is the case with the Act of 1862.

CHAPTER XVI.

COMMENCEMENT OF THE LIABILITY OF PARTNERS FOR COMPANY DEBTS AND OBLIGATIONS.

As the liability of partners for company debts and obligations depends upon their being its sureties for such debts and obligations as it has contracted as a *quasi* person through the instrumentality of one or more of them as its agents, it follows that such liability only commences from the date of its formation. Prior to that event there was no *quasi* person to contract, no agency by which it could be bound, and no sureties on whose guarantee the public could rely. Hence results the legal principle, that a partner is not liable for any obligations of his copartners, or for any acts they may have done, or any representations they may have made, before the company was formed.

Partners liable for debts contracted since formation only.

In private partnerships it often happens that, before the partnership is formed, those who afterwards become partners agree among themselves that one shall contribute goods and another money when the concern is set agoing. If, in such circumstances, the goods are furnished or the money is lent by third parties, they have no claim against the partnership when it is formed, but are limited to their recourse against the individual partners with whom they had transacted (*a*).

It makes no difference that the goods furnished or the money borrowed were applied to company purposes. The public creditor really contracted, not with the company, but with an individual;

(*a*) *Smith* v. *Craven*, 1 Cr. and J. 500; *Greenslade* v. *Dower*, 7 B. and C. 635; *Dickinson* v. *Valpy*, 10 B. and C. 141, 3 Ross L. C. 571; *Fisher* v. *Tayler*, 2 Hare 218; *Saville* v. *Robertson*, 4 T. B. 720; *Wilson* v. *Whitehead*, 10 M. and W. 503; *Barton* v. *Hanson*, 2 Taunt. 49. See *White* v. *M'Intyre*, 1841, 3 D. 334, for opinions of judges adopting the English authorities quoted above.

and the company were only concerned to see that their partner made good his contribution, get it how he might. Nay, even if he had been a partner at the time when he entered into the transaction, the company could only be bound where the contract had proceeded directly or by implication on its credit (*a*).

Exceptions. Agency before formation.

But if it appear that the transaction out of which the obligation arose was entered into with the knowledge and approbation of those who afterwards became partners, so that they led the creditor to contract on the faith of their responsibility, they will be held liable (*b*). In such cases, however, the partners are not liable in virtue of the partnership contract, or as sureties for a company debt, but in respect of an agency, express or implied, existing between them before the partnership came into existence (*c*).

Ratification after formation.

Partners may also become liable for the debts and obligations of their copartners, though entered into before formation of the firm, if after that event such obligations, or the transactions of which they are the consequences, have been adopted, ratified, or homologated by the company. Thus, if the company grant a bill for a debt not contracted by itself, but by its promoters, the partners will be bound (*d*); and so, a person who became partner with the lessee of a house after the commencement of the lease, and jointly agreed with him to pay additional rent for additional accommodation, was found liable as a partner for the whole rent (*e*).

Promoters.

One of the most important consequences and illustrations of the legal principle now under consideration, will be found in the well-established rule of law, that the *promoters* of joint-stock companies, *e.g.* railway companies, etc., have no power to bind the company when it comes into existence by its special act or otherwise, for such debts or obligations as they may have contracted while it was yet in an inchoate state, and they were endeavouring to effect its formation. See many examples of this rule in the chapter on Promoters.

It need scarcely be observed that the debts or obligations of a

(*a*) *White* v. *M'Intyre*, *supra*; *Jardine* v. *Macfarlane*, 1828, 6 S. 564; *Venables* v. *Wood*, 1839, 1 D. 659.

(*b*) *Gouthwaite* v. *Duckworth*, 12 East 421, 3 Ross L. C. 541. See *White* v. *M'Intyre*, 1841, 3 D. 334, opinions of judges.

(*c*) See *per* Lord Eldon in *ex parte Peele*, 6 Ves. 602, Coll. 362.

(*d*) *Lloyd* v. *Ashby*, 2 Car. and Pa. 138.

(*e*) *Hoby* v. *Roebuck*, 2 Marsh. 434.

partner joining a firm already formed, can never affect either the firm or its partners, unless guarantee or homologation in some form or other can be established.

Do incoming partners become liable for company debts already existing?

The very important question, whether a person joining an existing firm becomes liable for its debts and obligations already incurred, is attended with much more difficulty; and it cannot be said that our tribunals have as yet authoritatively recognised any very distinct theory or set of legal principles of invariable application in the matter; for though cases in which the question was involved have occasionally presented themselves for decision, they have been so complicated with special circumstances, that the judgments pronounced can hardly be taken as exponents of abstract doctrine. If, in order to elucidate the subject, recourse be had to the law of England, numerous authorities will be found dealing with the question both in its pure form and as affected by circumstances; but it will be felt that the practical rules there enunciated, though extremely equitable in themselves, cannot be blindly followed as precedents in Scottish practice, as they are, to some extent at least, based on a theory peculiar to that system, and unknown in the law of Scotland. It is probable, indeed, that in this as in many other instances, a careful investigation will disclose the same equitable principles underlying the technical peculiarities of both systems, and leading by different theoretical processes of reasoning to similar results in practice. Yet it is necessary, in a question of such importance as that now under consideration, to obtain, as far as possible, clear views of the theoretical principles recognised in both systems, before determining how far and to what effect the practical rules of the one are precedents of authority in the other. We shall accordingly proceed with the investigation of this question by adverting, at the outset, to such equitable considerations as present themselves irrespective of technical reasoning; we shall next refer to the theory and practice of English law; and we shall then endeavour to ascertain what the decided cases point to as the Scottish theory, and what are to be taken as its practical consequences.

Equitable considerations.

If the mere fact of joining a firm or private company already in operation were to be held as sufficient to involve a party in liability for all its debts and obligations previously contracted, it might be

argued with great force, that persons would often be rendered liable for obligations about whose contraction they were never consulted, and of whose very existence they were ignorant; that creditors would be furnished with a security for which they had never bargained, and which they could not possibly have had in view; and that as the entrance of new partners into the firm does not injure, so there is no reason why it should benefit, a previous creditor. Yet, plausible and equitable as these arguments appear, it may be fairly questioned whether they are not at least balanced by considerations on the other side. He who of his own accord enters an existing partnership, without ascertaining its liabilities, or without obtaining sufficient security from the old partners against them, can hardly be acquitted of gross negligence. It must also be noted that, in some cases, the entrance of a new partner may really injure the position of a previous creditor. The new partner, by his very entrance, acquires a right to share profits, and thereby to participate in the very fund intended to meet the obligations of the firm. His contribution may indeed equalize this; but what if he makes no pecuniary contribution, or one that is inadequate or illusory? Furthermore, it must be observed that a creditor's chance of payment often depends very much on the success with which the business is carried on, and this again obviously depends on the prudence and ability of those by whom it is conducted. Yet the incoming partner becomes an agent for the firm like the others; and while its prosperity may be augmented by his exertions, its want of success or total ruin may be the results of his ignorance or recklessness. Now, as the creditor is never consulted as to the qualifications of the new partner, upon whose admission so much may come to depend, it seems rather inequitable that a stranger should be allowed to enter a firm on any other terms than those of adopting its existing liabilities in common with the other partners.

English law.

In this conflict of equitable considerations, the law of England has adopted the following rule as a general principle:—No person who is admitted as a partner into an existing firm, becomes by his entry liable to the creditors of the firm for anything done before he became a partner. In the words of Lord Kenyon, 'it would be carrying the liabilities of partners for each other's acts to a most unjust extent, if we suffered a new partner to be bound

in this manner for an old debt incurred by other persons' (*a*). But apart from equitable considerations, this rule is also said to be a consequence of the English theory of partnership; for as in that system the partners are not considered to be agents for the *quasi* person of the firm, which indeed the law does not recognise, but are deemed to be agents mutually for each other, it is argued that an incoming partner is not bound by obligations which were contracted by the other partners before they had in any sense become his agents.

Limited in its application.

By referring, however, to the decisions last noted, it will be seen that the rule here stated merely amounts to a presumption in law that the incoming partner had not agreed to undertake such obligations; and that this presumption may readily be overcome by evidence of facts and circumstances to the contrary. Thus, payment of old debts, accompanied by evident knowledge of the existence of such debts, and benefit derived from the contracts on which they are founded, have been held sufficient to warrant the conclusion that the incoming partner had agreed to undertake such previous obligations (*b*).

Tendency of the English courts.

The tendency of the English courts is undoubtedly to infer this agreement from apparently trivial circumstances (*c*). But a distinction is made between an agreement to share liability *inter socios*, and an engagement to incur liability to the public; and it is held that the former does not involve the latter. For it is argued, that as creditors look only to the credit of those who are partners when the debt is contracted, a private arrangement, whereby an incoming partner undertakes to assist the others in their difficulties, cannot infer liability to those who were no parties to the arrangement (*d*).

Of course the signing of the company firm to any document acknowledging the debt will effectually bind the incoming partner, if this be done with his consent or authority after his accession to

(*a*) *Per* Lord Kenyon in *Shirreff* v. *Wilks*, 1 East 48, 3 Ross L. C. 488. See also *Catt* v. *Howard*, 3 Stark. 5; *Young* v. *Hunter*, 4 Taunt. 582; *ex parte Jackson*, 1 Ves. jun. 131, Coll. 362, Lindley 317; *per* Parke, J., in *Vere* v. *Ashby*, 10 B. and C. 297.

(*b*) *Ex parte Jackson*, 1 Ves. 131; *ex parte Peele*, 6 Ves. 602; *Helsby* v. *Mears*, 5 B. and C. 504; *ex parte Whitmore*, 3 Deac. 365; Cooke's Bank. Law 534; Lindley, p. 317.

(*c*) Lindley 317; Coll. 362; Cooke's Bank. Law 534 (8th ed.).

(*d*) *Vere* v. *Ashby*, 10 B. and C. 298, *per* Parke, J.; *ex parte Williams*, Buck 13; *ex parte Freeman*, Buck 471; *ex parte Fry*, 1 Gl. and J. 96.

the concern; but the granting of such document for an old debt without his knowledge will not bind the incoming partner, but will be held to be a fraud upon him by his copartners (*a*).

Scottish law.

According to the theory of Scottish law, the partners are agents for the *quasi* person of the firm, and not mutually for each other; and the liabilities they incur are not for the obligations of each other, but for those of the firm, in consequence of their being its guarantees or sureties. It may therefore perhaps be argued, that as every man who enters a firm becomes *ipso facto* guarantee for its obligations, he incurs equal liability for past as for future engagements. And this view is probably taken by many as a correct exponent of the law of Scotland. Yet, when examined into, its soundness in theory appears to be as questionable as its results, if rigorously carried out, would appear inequitable in practice; and we are not aware of any reported case in which it has been formally enunciated, or of which it has formed the *ratio decidendi.*

What appears to be its true theory.

There is no authority for the proposition, that the *quasi* person of a private firm or company is, like the proper person of a corporation, possessed of endless endurance; so that while the composing units change, the company itself remains a continuous legal entity. It would rather appear that every change of membership in a private firm involves, in contemplation of law, the dissolution of an old, and the simultaneous creation of a new, company; and that consequently the question, whether an incoming partner is to be held liable for debts for which his copartners are responsible as members of the old firm, depends for solution on the previous question, whether the new firm brought into existence by his entry has, by implication or otherwise, taken over the obligations of the old. This view, which has much to recommend it in theory, appears to be the true *ratio* of the decided cases, to which we shall presently refer, and to lead to much the same practical results as the English rules to which we have just been adverting.

Case of an individual succeeded by a firm.

To understand this doctrine and its mode of operation, it is best to begin with the case of an individual, who, at first engaged singly in the prosecution of some business or trade, afterwards assumes one or more persons as partners, thereby constituting a

(*a*) *Shirreff* v. *Wilks*, 1 East 48. Here a bill for an old debt was accepted by one partner with the view of binding an incoming partner.

firm, by which the business is thenceforth carried on. Here, there are clearly two distinct persons—the individual who originally carried on the business, and the firm by which it was afterwards continued. Now, whether, and to what extent, those joining as partners are liable as such for debts and obligations previously contracted by him with whom they have subsequently become partners, obviously depends on whether, and to what extent, the firm of which they are partners has incurred this liability. This is plainly a question of fact, to be determined by the general complexion of the evidence. Yet there are some presumptions which seem to present themselves at the very threshold of the inquiry.

Presumptions.

In the first place, with respect to such debts or obligations as were previously contracted by the individual trader, not in the line of his business, but as a private person, the presumption will be that they were not taken over by the firm. And the same presumption will hold true as regards liabilities contracted by him in some line of trade different from that for the prosecution of which the company was afterwards formed, as *e.g.* where a man carried on business both as a merchant and as a farmer, and afterwards assumed partners in the former concern only. This follows from the consideration, that if the company had been in existence when such liabilities were contracted, they would have lain beyond its prescribed sphere of operation. To overcome this presumption, and establish the contrary proposition, it would be necessary to prove, either that the liabilities in question had been specially taken over, or else that the firm had in some way or other become a *quasi* partner with the primary obligor in relation to these liabilities. As regards again such debts or liabilities as, contracted by the original trader before he assumed partners, would plainly have fallen within the sphere of the company's operations if it had then been in existence, the presumption will be that they were taken over by the company at the date of its formation, and the *onus* of showing the contrary will lie on the company. By the mere fact of its coming into existence in the supposed circumstances, the company received the benefit (whatever that might be) of the goodwill and of the connection already formed in the line of its business, so that the maxim applies, *Qui sentit commodum sentire debet et onus.* This presumption will be greatly intensified, if the partner who originally

carried on the business singly has made other valuable contributions; and in so far as the public is concerned, it may become altogether insurmountable, if it can be shown that the company took over the assets of the former business. In determining questions of this kind, the partnership articles, or other instruments of formation, are entitled to great consideration; but though conclusive *inter socios*, they cannot for obvious reasons be deemed so in a question with public creditors who had no share in their formation, and were never made aware of their provisions (*a*).

Case of one firm succeeding another.

Now if, instead of a company succeeding to an individual, we take the case of a new firm succeeding to an old, we shall in like manner have two distinct persons; the only difference being, that in the case supposed they are both *quasi* persons. And this appears to take place in contemplation of law, not only where there has been a formal dissolution of an old company, and an equally formal creation of a new, but whenever a change of membership has taken place either by the addition of one or more new partners, or by the resignation of one or more old partners in favour of new (*b*). In this case, therefore, as in the preceding, the question whether, and to what extent, a new partner is responsible for liabilities contracted before he became a partner, will be solved by inquiring how far the new firm has become liable for the engagements of the old,—in other words, how far the *quasi* person of the former represents the *quasi* person of the latter. This, as in the preceding case, is a question of fact, and the same or similar presumptions will apply. Liabilities contracted by the old firm in a line of business other than that pursued by the new, will not be presumed to have been taken over; and this would seem to apply *a fortiori* to liabilities arising out of transactions into which the old firm could not have entered without the consent of all the members; for even if the new partner had been a member of the old firm, his consent would have been necessary to validate such transactions. But as regards all liabilities falling within the same line of business with that pursued by the new firm, the presumption is that they were taken over at formation; and this presumption will be greatly strengthened, and perhaps rendered insurmountable, if the new firm has acted so

(*a*) See *Millar* v. *Thorburn*, 1861, 23 D. 359.

(*b*) See *Kerr* v. *M'Kechnie*, 1845, 7 D. 494.

as to lead the public to believe that it is still the same concern, as, for example, where it prosecutes the same line of business, and avails itself of the established connection and goodwill of its predecessor, and still more when it retains the name of the old firm. In such cases, whatever may have been the real intention, the new firm seems barred by its conduct from attempting to rebut the legal presumption. Where the liabilities of the old firm have been taken over *per expressum*, as by a clause to that effect in the contract of formation, it is of no consequence whether these liabilities were or were not within the line of trade prosecuted by the new firm; and this rule would also seem to hold good where the new firm has plainly identified itself with the old, as *e.g.* by taking over the assets, or representing itself to the world as the same concern. Whenever liability can thus be fixed against the new firm for all or some of the debts and obligations of the old, the new partners will to that extent incur liability as its guarantees or sureties (*a*).

Liability in such cases not always inferred.

But, on the other hand, it must be observed, that the mere fact of a new firm coming into existence simultaneously with the dissolution of a concern previously carrying on business, does not *per se* infer that the one has taken up the liabilities of the other. Nor does the circumstance that the new firm prosecutes the same line of business with the old necessarily affect the question, since every one is free to follow what line of lawful trade he chooses; and even though the same premises are made use of, this may be of no consequence, since they may have been acquired without the knowledge, and even contrary to the desire, of their former occupants. Even though some of the partners of the new firm were also partners of the old, this may go a very small way to infer representation; since it is quite possible, and is indeed a matter of daily occurrence, for the same individual to be a member of two firms, without in the least degree rendering the one firm liable for the engagements of the other. Nay, it is quite possible that the new company may have the same business connection as the old without inferring representation as regards liabilities, for the

(*a*) See *Ridgway* v. *Brock*, 1831, 10 S. 105; *M'Keand* v. *Reid*, 1860, 23 D. 846; *Pearston* v. *Wilson and Maclean*, 1856, 19 D. 197; *Buchanan* v. *Somerville*, 1779, M. 3402; *Maclean* v. *Rose*, 1836, 15 S. 236; *Mercer* v. *Peddie*, 1832, 10 S. 405; *Muir* v. *Dickson*, 1860, 22 D. 1070; *Alexander* v. *Clark, etc.*, 1862, 24 D. 323.

goodwill may have been purchased. In short, it is not any one of these circumstances taken singly, nor even all taken together, that will necessarily render a new firm liable for the debts of an old. To bring about this result, one of two things must be made out,—either (1) that the new firm has *de facto* come in place of the old, or (2) that it has so acted as to lead the public to that inference. It need hardly be observed, that the creation of a new company has no effect to liberate the partners of the old concern from their personal liability for its debts and obligations. *Quoad* these the old company still subsists until their extinction, and its *quondam* partners remain liable as its sureties or guarantees (*a*).

Similarity of results in English and Scottish law.

It would thus appear that, practically, the same circumstances will in Scotland as in England infer liability against an incoming partner for debts or obligations previously contracted,—the difference between the two systems being only in the theory or mode of expression. In England, his liability is said to depend on his having identified himself to that effect with his copartners; in Scotland, on the new firm of which he is a member having identified itself to that effect with the old.

Cases where an incoming partner incurs liability irrespective of the new firm.

It must be observed, however, that cases may occur even in Scotland of an incoming partner incurring liability for debts previously contracted, which are not to be explained on the theory we have just been considering. In such cases the liability may not attach to a new firm, and would arise whether a new firm were brought into existence or not. It is a consequence of something having been done by the incoming partner whereby he has directly undertaken responsibility for the previous obligations of his copartners, or has incurred this responsibility as their *quasi* partner before he assumed the relation of actual partnership. Thus, if an incoming partner sign bills, bonds, or other obligations for debts previously contracted, or became the legal representative of a former partner who had incurred such liabilities, he will render himself responsible, for in such circumstances he would be equally liable though he should never enter the firm. The same result will follow if it be a rule of the concern that every one joining it does so on condition of becoming bound for its previous obligations, or if such

(*a*) See *M'Keand* v. *Reid*, *supra*, and previous cases; *Macintosh* v. *Gibb*, *etc.*, 1828, 6 S. 992.

be made the condition in the case of the particular individual, or if a new partner has entered the firm by coming exactly in place of a former partner who has resigned in his favour (*a*). So also an incoming partner will be held liable, if he has made himself a *quasi* partner with the old firm, by sharing its profits, by holding himself out as one of its partners, or by recognising the agency of the other partners to bind him. In such cases the liability for old debts will be equally good against the incoming partner, even if we suppose that a new firm has not been created, or that it has not undertaken the obligations of the old. Hence, if a number of persons were to join an old firm, and thereby form an entirely new company, one of their number might render himself effectually liable for the debts of the former concern while the others remained free.

Obligations *inter socios* do not necessarily infer liability to the public.

It must be observed, however, in relation to this matter, that an arrangement *inter socios* that an incoming partner shall contribute to a certain extent towards relieving the original partners of existing obligations, does not necessarily infer the liabilities of a partner to the public. If this is a mere private arrangement to which the public creditor was no party, the latter could only render it available by assignation, legal or conventional, from the old firm in his favour, and only to the stipulated amount. No doubt such private arrangements, taken in connection with other circumstances, will afford a strong presumption that the new firm has *de facto* taken over the obligations of the old, or that the incoming partner has *quoad* these obligations become a partner of the old concern (*b*); yet they are not conclusive.

New shareholders in corporations;

In the case of a proper corporation, incoming shareholders incur responsibility for its existing debts and obligations according to the liability attaching to the shares, or to the interest in the company of which they become possessed, as provided in the instrument of incorporation. The reason of this is, that the corporation is a continuous entity, and retains its liabilities as well as its rights irrespective of its fluctuating membership; and the liability to contribute

(*a*) See *Maclean* v. *Rose*, 1836, 15 S. 236.

(*b*) See the English cases, *ex parte Williams*, Buck 13; *ex parte Freeman*, *ibid.* 471; *ex parte Jackson*, 1 Ves. jun. 131, Cooke's Bank. Law 534; *ex parte Peele*, 6 Ves. 601; *ex parte Whitmore*, 3 Deac. 365; *Page* v. *Cox*, 10 Ha. 163; *Lemere* v. *Elliot*, 6 H. and N. 656.

attaches to the shares, by whomsoever they may be held. This holds good even in the case of such corporations as are formed under the Letters Patent Acts or by registration, without conferring on their members the privileges of limited liability; for notwithstanding of this, they are still corporations.

in common law companies.

As regards common law companies, which wear the external appearance of corporations, from their being managed by directors and having a capital divided into shares transferable at the will of their owners, the question whether an incoming shareholder incurs liability for company obligations previously contracted, is attended with considerable difficulty. With respect to such liabilities as may have been incurred by the promoters before the partnership relation was formed by the company being brought into existence, there can be no doubt that it is in a similar position with corporations and ordinary firms,—that is to say, the future members can never be held liable when the company, after formation, has not adopted the obligations of its promoters (*a*). But the question is very different with regard to the liability of persons joining the company subsequent to its formation for obligations which it has *de facto* incurred.

English law.

According to the law of England, a distinction appears to have been taken between the liability of shareholders among themselves, and their liability as to creditors. The shareholders have been held liable for all past obligations in a question with each other, the mere fact of their purchasing shares being taken as evidence of their agreement to incur such liability; but the ordinary partnership rules have been held to apply in questions with the public (*b*).

Scottish law.

It is very questionable whether these views can be taken as in conformity with the law of Scotland. Associations of the kind now under consideration seem in contemplation of our law to be somewhat more than mere firms, though they are not corporations, and to stand as it were midway between the two. They cannot, indeed, appear judicially by a descriptive name without joinder of partners, but the *quasi persona* appears to be much more developed in their case than in that of private firms; and no countenance has ever been

(*a*) See 'Promoters,' *supra*.

(*b*) *Cape's Exs.*, 2 De G. M. and G. 562; *Thomas* v. *Clark*, 18 C. B. 662. See Lindley 318.

given to the notion, that the resignation of one member dissolves the concern, or that an increase of membership creates a new company. On the contrary, it is one of the distinguishing characteristics of such associations, that their shares may be bought and sold like those of incorporated companies. It would therefore seem that the *quasi persona* is to many effects possessed of continuous existence, however much the membership may fluctuate, and is capable of incurring and sustaining obligations irrespective altogether of the members of whom for the time being it may be composed. Now, if this be so, it seems to follow that all incoming shareholders become *de facto* liable for its existing obligations at whatever period they may have been incurred, because the *quasi persona* is the real and subsisting debtor, and they are its guarantees or sureties. Indeed, it may be said that all persons entering such associations are bound to know this, just as they are bound to know that the executive management of such companies is entrusted to directors, and not to the members generally; so that the mere fact of their entering the concern may be said to imply their consent to become liable for its existing obligations. It may indeed be argued, that in this view partners disposing of their shares ought *ipso facto* to be released from their liabilities by delegation to their disponees; but though this may in old times have been law in Scotland, the fact that it is not so now does not affect the question, since a man may always become liable for an obligation in which there are previous obligants without releasing any of their number. That the doctrine here stated is law in Scotland, is strongly indicated by the fact that it is generally so understood, and seems to have been universally acted upon in practice; indeed, no case seems ever to have occurred in which a defence founded on the English rules has even been so much as stated where incoming shareholders have been sued for company obligations (*a*).

Amalgamation. When two companies amalgamate, the liabilities of each for the debts and obligations previously contracted by the other will fall to be regulated by the same rules as would apply in the case of two

(*a*) See *Maclean* v. *Rose*, *supra*; *National Exchange Co.* v. *Drew and Dick*, 1860, 23 D. 1; *Wilson* v. *Bruce*, 1853, 16 D. 171; *Inglis* v. *Lumsden*, 1859, 21 D. 192; *Liquidators of Western Bank* v. *Douglas*, 1860, 22 D. 447; *Dobbie* v. *Johnstone*, 1859, 21 D. 624.

individuals forming a partnership. This appears to have been decided in England (*a*), and there seems no reason to doubt that it would be held law in this country (*b*). In like manner, when the proper person of a corporation, or the *quasi* person of a firm, becomes the partner of another company, the same rules seem to apply.

(*a*) Lindley, Supp. 75.

(*b*) See *Western Bank* v. *Ayrshire Bank*, 1860, 22 D. 540; *Buchanan* v. *Lennox*, 1838, 16 S. 824.

CHAPTER XVII.

CONTINUANCE AND EXTINCTION OF LIABILITY OF PARTNERS, ETC., FOR COMPANY OBLIGATIONS.

Ambiguity of expression.

THE expresssion, liability of partners for company obligations, is ambiguous. It may mean one of two things, and it may mean both. It may mean, first, that liability which attaches to every partner for company obligations already incurred; and it may mean, secondly, the liability which he, once being a partner, may retain, to be made responsible for obligations to be incurred by the company hereafter. In other words, it may mean responsibility for the past, or liability to be made responsible for the future. Again, it is sometimes used as a compendious phrase to cover both meanings, as in such phrases as 'limited' and 'unlimited liability.'

Responsibility for future acts.

The distinction, however, is important; and a disregard of it has often been productive of much confusion of thought. The liability to be made responsible for future acts begins as soon as the partnership relation is constituted: it terminates, as regards the *socii*, by the severance of the partnership relation, unless for purposes of winding up; but as regards the public, it only ceases when due notification has been made that the partnership relation is brought to an end.

Liability for existing obligations.

On the other hand, the liability for past engagements survives the severance of the partnership relation, and as regards the public terminates only by implement or satisfaction; while, in a question with the *socii*, it may be brought to an end by arrangement, even before the company obligation has been extinguished.

These observations of course apply only to partnerships and unincorporated companies. In the case of bodies incorporated by charter, special act, or registration, different rules apply, which will be afterwards considered.

In prosecuting our inquiries into this branch of the subject, we shall, in accordance with the distinction above explained, consider

first the duration and termination of a partner's liability for company obligations already incurred, and then proceed to consider a partner's liability to be made responsible for future company obligations.

TERMINATION OF LIABILITY OF PARTNERS FOR COMPANY OBLIGATIONS ALREADY INCURRED.

When a firm or company unincorporate has once incurred an obligation to the public, each of the partners becomes, as we have already seen, liable to the utmost extent of his means and estate for its fulfilment; and until the obligation has been extinguished or discharged as against the concern, no arrangement to which the creditor has not been a party will have the smallest effect to abate or diminish this liability. Thus a person may retire from the concern with the consent of all the other partners, and he may duly notify this fact to the public; he may put into the hands of the remaining partners who continue the business, sufficient means to pay all the company debts, and he may take them bound to pay within a specified term; he may also take a full discharge from them of all his liabilities as a partner; yet none of these acts, nor all of them combined, will in the least degree release him from the claims of a creditor who has not assented to or homologated the arrangement (*a*).

This liability can be extinguished in two ways only.

From this it follows that there are only two ways in which a partner can get rid of his liability for obligations once incurred by a company of which he is or was a member. The first of these is by the debt being extinguished as against the company; and the second is, by virtue of some arrangement to which the company creditor is a party.

We shall consider these two modes more in detail.

By extinction of company obligation.

1. A partner is released when the obligation is extinguished as against the firm.

This rule may be said to be of universal application; for it depends on, and is a necessary consequence of, the well-known doctrine, that a release to a principal is a release to his sureties. It admits, however, of one exception. The creditor may release the company on condition of receiving the partner as sole debtor, by

(*a*) *Milliken* v. *Love*, 1803, Hume 758; *Walker* v. *Davidson*, 1821, 1 S. 754; *Mathison* v. *Fraser*, 1820, Hume 21.

delegation (*a*). Thus, if a company be at once debtor to one of the public, and creditor of one of its own partners in the same or a larger amount, then if the company creditor agree to accept of the partner as his debtor in lieu of the company, the company will be completely discharged, but the partner will remain bound; nor will the latter have any claim of relief against the company, for his claim is barred by compensation. With this single exception, there does not appear to be any case in which a partner can remain bound after the company has been discharged.

By arrangement with the creditor.

2. A partner may be relieved of liability for a company obligation, in consequence of an arrangement to which the creditor has been a party.

A very common example of this kind of release is afforded by cases in which the creditor agrees to accept of a new company in place of the old firm, as his debtor (*b*). In such cases, the only difference between the new and the old company is often the retirement of one partner and the substitution of another. So that it may be sometimes more correct to say, that the old *quasi* person of the firm remains, but that one of its former members has been released. A release obtained in this way does not require to be a formal document, or even to be reduced to writing at all; but inasmuch as the law never presumes in favour of such arrangements in prejudice of the public creditor, the evidence of the creditor's assent to the release of one of his guarantees for the company debt must be clear and unmistakeable (*c*).

TERMINATION OF A PARTNER'S LIABILITY TO BE MADE RESPONSIBLE FOR THE FUTURE ACTS OF THE COMPANY.

In so far as the *socii* are concerned, a partner may at any time get rid of his liability to be made responsible for the future acts of

(*a*) *Davidson* v. *Rankin*, 1733, M. 7061. See p. 271 *et seq.*

(*b*) *Buchanan* v. *Somerville*, 1779, M. 3402. See also *Pearston* v. *Wilson*, 1856, 19 D. 197; and the English cases, *Hart* v. *Alexander*, 7 C. and P. 746, and 2 M. and W. 484.

(*c*) *Ramsay's Execrs.* v. *Graham*, 1814, 17 F. C. 519; *Muir* v. *Dickson*, 1860, 22 D. 1070; *Lodge* v. *Dicas*, 3 B. and A. 611; *David* v. *Ellice*, 5 B. and C. 196; *Thompson* v. *Percival*, 5 B. and Ad. 925; *Thomas* v. *Shillibeer*, 1 M. and W. 124; *Kirwan*, 2 Cr. and M. 617; *Gough* v. *Davies*, 4 Price 200; *Blew* v. *Wyatt*, 5 Car. and Pa. 397.

the company, or of them as its agents, either by dissolution of the company, or by withdrawing from the concern without dissolution, when either of these events has validly taken place. But in a question with the public the matter is very different. As the public has been led to regard the concern as guaranteed by the credit of each of the partners, the retirement of any of their number will not be held to relieve him from liability for the subsequent acts of the remaining partners who still carry on the concern; nor will its entire dissolution have this effect if some of the former partners still appear to prosecute the business as before. To effect this, the public must in some legal manner be certiorated that the retiring partner no longer guarantees the company as formerly; or, in the language of the English law, has withdrawn the agency which he had previously conferred on the other partners to bind him within the sphere of the company's action.

General rule.

Hence results the general rule, that to destroy liability for future acts, *notice* is indispensable (*a*).

In an old case, a decision apparently adverse to this was given; but the law has long been fixed as here stated (*b*). In England it has been held that the liability of a partner retiring without notice extends even to the case of *torts*, committed by his former copartners subsequent to his withdrawal (*c*).

The right to give this notice is inherent in every member of a copartnery, who is entitled to retire or dissolve the concern; and in England, a court of equity has compelled a refractory partner to consent to such notice being given (*d*).

In determining what shall be sufficient notice, a distinction must be taken between persons who have already had dealings with the company, and strangers.

Customers.

As regards customers, it was observed by Lord Ellenborough, that the usual and proper course was to send circular letters to all with whom the firm has had dealings (*e*). And when this has been

(*a*) *Dalgleish* v. *Sorley*, 1791, Hume 746, Bell's Ca. 487, M. 14595; *Boulton* v. *Mansfield*, 1786, 1 Bell's Illus. 259, aff. 3 Paton 70; *Campbell* v. *M'Lintock*, 1803, Hume 755; *Hunter* v. *Evans*, 1830, 9 S. 159; *Graham* v. *Henderson*, 1802, 4 Pat. Ap. 421.

(*b*) *Armour* v. *Gibson*, 1774, M. 14575, Hailes 600.

(*c*) *Stables* v. *Eley*, 1 Car. and Pa. 614.

(*d*) *Troughton* v. *Hunter*, 18 Be. 470.

(*e*) *Jenkins* v. *Blizard*, 1 Stark. 418. See *Padon* v. *Bank of Scotland*, 1826, 5 S. 160.

done, the *onus* of showing that the letter has miscarried will lie on the creditor to whom it had been addressed and posted (*a*).

Change of firm.

An obvious change of firm is commonly said to be sufficient notice, on the ground that it puts the creditor on his guard to make proper inquiries (*b*); but the author has not been able to find any case in which this was by itself held to be sufficient in a question with customers (*c*).

Alteration of cheques.

An alteration of the cheques or notes of a banking company has been thought good notice to those who have drawn cheques addressed to the new firm (*d*).

Gazette notices.

Gazette notices alone, or accompanied by advertisements in other newspapers, are not sufficient in a question with former customers, unless it can be shown that they came to the knowledge of the creditor (*e*). But, in truth, the question of sufficient notice to customers is one of fact, to be determined by a jury or its equivalents. No particular form is necessary, provided notice have been *de facto* received (*f*); and, on the other hand, neither advertisement in the *Gazette* and the public journals, nor circular notices, will avail, if the creditor can show that he did not see the advertisement nor receive the notice (*g*).

Strangers.

As regards strangers, *i.e.* such as have not formerly dealt with the firm, the proper form of notice is by advertisement both in the *Gazette* and in the local newspapers. This, in a question with strangers, will be held sufficient, unless the retiring partner has done something to counteract its effect, as, *e.g.*, leaving the name of the old firm over the door of the premises in which the business is still carried on (*h*).

Gazette notices. Advertisement.

It has been said that the *Gazette* notice alone is sufficient (*i*); but this cannot be relied on (*k*). Publication in any number of news-

(*a*) See last cases.

(*b*) Sh. Bell's Com. 225.

(*c*) See *Dunbar* v. *Remmington*, March 10, 1810, 15 F. C. 620; *Maciver* v. *Humble*, 16 East 169; *Gorham* v. *Thompson*, 1 Peake N. P. 42.

(*d*) *Barfoot* v. *Goodal*, 3 Camp. 147.

(*e*) *Graham* v. *Hope*, Peake 154, and 3 Ross L. C. 633. See also *Kemp* v. *Allan*, 1824, 3 S. 104; *Wright* v. *Gardner's Trust.*, 1831, 9 S. 721.

(*f*) *Bertram* v. *M'Intosh*, 1822, 1 S. 290.

(*g*) See, in addition to the cases noted *supra*, *Sawers* v. *Tradestown Vict. So.*, 1815, 18 F. C. 233; *Williams* v. *Keats*, 2 Stark. 290; 1 Bell's Illus. 261; *Hart* v. *Alexander*, 2 M. and W. 484; *Thomson* v. *Speirs*, 1822, 20 F. C. 655, 2 S. 554.

(*h*) *Williams* v. *Keats*, 2 Stark. 290.

(*i*) Lindley 336. *M'Millan* v. *Walker*, 1814, Hume 755.

(*k*) *Sawers* v. *Tradest. Vict. So.*, *supra*; *Williams* v. *Keats*, *supra*. But see *Godfrey* v. *Turnbull*, 1 Esp. 371, and 3 Ross L. C. 632; *Newsome* v. *Coles*, 2 Camp. 617, 1 Bell's Illus. 261; *Graham* v. *Hope*, 1 Peake N. P. 154; *Douglas Wilson* v. *M'Caully*, 1814, 18 F. C. 127.

papers will not of itself be sufficient without the *Gazette* notice (*a*); nor will evidence that the newspaper in which the notice was inserted, circulated in the locality where the stranger creditor resided, avail (*b*). But if it be proved that the party took in the newspaper, it is good evidence for the jury, though it is not to be taken as conclusive (*c*). Of course, if it be proved that the creditor saw the advertisement, that will obviate all further inquiry (*d*).

Admission of evidence at trial.

As to the admissibility of evidence of notice, it may be remarked, that if the dissolution is by agreement, the agreement cannot be put in without being stamped; and the advertisement of such agreement is in the same position. But the *Gazette* notice, or other advertisement of an actual dissolution, being a mere recital of fact, may be laid before the jury without any stamp (*e*).

General rule.

The general rule, as we have seen, is, that the withdrawal of a partner from the concern, or the dissolution of the copartnery, must be notified in order to save from future liability for subsequent acts. Some exceptional cases, however, exist. These are three in number: 1. Dissolution by death; 2. Dissolution by bankruptcy; 3. Retirement of a dormant partner.

1. *Dissolution by Death.*

Dissolution by death.

It is settled law, that dissolution of a partnership by death requires no notice, either to the customers of the company or to the world, in order to stop the responsibility of the deceased partner's representatives for debts arising under a continuance of the firm (*f*).

Reason of this exception.

It is not very easy to see the reason of this exception. It has sometimes been defended on the technical ground, that the authority of a mandatory falls by the death of the mandant (a doctrine of English as well as of Scotch law); so that as a partner is only

(*a*) *Leeson* v. *Holt*, 1 Stark. 186.

(*b*) *Norwich and Lowestoft Co.* v. *Theobald*, M. and M. 153.

(*c*) *Rooth* v. *Quin*, 7 Price 193; *Jenkins* v. *Blizard*, 1 Stark. 418; *Rowley* v. *Horne*, 3 Bing. 2. See also *Speirs* v. *Royal Bank*, 1822, 1 S. 478.

(*d*) *Rooth* v. *Quin*, 7 Price 193.

(*e*) Sh. Bell's Com. 227; *May* v. *Smith*, 1 Esp. 283; *Jenkins* v. *Blizard*, 1 Stark. 489. See also *Wheldon* v. *Matthews*, 2 Chitty 399.

(*f*) *Vulliamy* v. *Noble*, 3 Merivale 614, and 1 Bell's Illus. 256; *Johnes's* case, 1 Merivale 619; *Kemp* v. *Allan*, 1824, 3 S. 104; *Christie* v. *Royal Bank*, 1839, 1 D. 745, 2 Rob. 118; *Aytoun* v. *Dundee Bank*, 1844, 6 D. 1409. See *Paterson* v. *Pollock*, 16 F. C.

guarantee for the company within the sphere of the mandate he had given the other partners to bind it, his death, recalling such mandate, liberates his representatives from all liability for obligations subsequently contracted by the firm (*a*). But it is evident that the question is not whether the agency has *de facto* been recalled, but whether the public have received notice thereof.

It is perhaps more correct to say, that death is a public fact, which soon makes itself generally known; and that, were the common rule requiring notice to be enforced, the representatives of deceased persons would be continually exposed to fraud and injustice.

Roman law.

In the Roman law, liability did not cease until the other partners had notice of the death, the mandate not being held to fall until after such intimation (*b*). This also appears to have been the doctrine of the old French law, as laid down by Pothier (*c*).

It might be thought that, from principles of equity, this rule of the civil law would be held to apply both here and in England, if, in ignorance of a partner's death, the copartners were to incur debts subsequent to that event, particularly if the question were to arise between the surviving partners and the representatives of the deceased. The law would, however, seem to be otherwise (*d*).

Death has no retro-active effect.

It may be here observed, that the death of a partner has no retro-active effect, so as to free the surviving partners from liability for orders given by the deceased partner during his life, though they were not implemented till after his death. Death indeed terminates agency, but does not neutralize the consequences of its former exercise (*e*).

2. *Dissolution by Bankruptcy.*

Bankruptcy.

When a company becomes bankrupt, it is dissolved as to the power of carrying on business; and the agency of each partner to bind the firm terminates. The same rule applies on the bankruptcy of one of the partners, which, though it may not dissolve the firm, terminates the agency of the bankrupt partner (*f*).

(*a*) Lindley 325.

(*b*) Dig. lib. xvii. tit. 2, l. 65, s. 10.

(*c*) Pothier, Pand. lib. xvii. tit. 2, n. 58; Pothier, *de Société*, No. 156.

(*d*) *Aiton* v. *Cheap*, 1769, M. 14573, 2 Pat. App. 283. See the English cases, *Blakeley's Executors*, 3 M. and G. 726; *Hamer's Devisees*, 2 De G. M. and G. 366.

(*e*) *Usher* v. *Dauncey*, 4 Camp. 97, 1 Ross L. C. 165; *Cheap* v. *Aiton*, 1772, M. 14573, Rev. 2 Pat. Ap. 283.

(*f*) See chap. on Dissolution.

As a consequence of this, it has been held in England (where bankruptcy is deemed a public act), that when a firm becomes bankrupt, no notice is required to free the assignees from liability to the public, or to customers for subsequent acts done by the former partners (*a*). And so far has this been carried, that even where debtors of the firm have, in ignorance of its bankruptcy, made payment to the partners of debts formerly contracted, they have been held liable in repetition to the assignees (*b*). When a single partner becomes bankrupt, the English rule is, that the partnership is dissolved. And this rule holds good whether the partner was made bankrupt for a private or for a company debt. The case would seem to be different in companies with transferable shares and managing officials (*c*). When in a private partnership a partner becomes bankrupt, it is held accordingly that the authority of all the partners to bind each other terminates, and that without any notice to the public or to customers. The assignees of the bankrupt partner are not therefore bound by the subsequent acts of the solvent partners; nor are these last liable for the acts of the bankrupt partner (*d*). But though this appears to be the general rule, it should seem that it is not always strictly enforced in cases of *bona fide* creditors who have dealt with the solvent partners in entire ignorance of the bankruptcy of another partner (*e*), and there is no reason to suspect fraud (*f*). It must be confessed, however, that upon this branch of the subject the law of England seems far from being in a very satisfactory state, and cannot therefore be expected to throw much light on the nature of the principles by which it should be regulated. English law.

In the law of Scotland we are left very much to be guided by theory, as no reported cases raising the questions now under consideration are, so far as the author is aware, to be found. It is undoubtedly true that a partnership is effectually dissolved by the Scottish law.

(*a*) Lindley 945; *Aitchison*, 3 Drew. 637.

(*b*) *Turquand* v. *Vanderplank*, 10 M. and W. 180.

(*c*) Lindley 188.

(*d*) *Harvey* v. *Crickett*, 5 M. and S. 341; *Fox* v. *Hanbury*, Cowp. 445; *Edwards* v. *Hooper*, 11 M. and W. 363; *Hague* v. *Rolleston*, 4 Burr. 2174; *Thomason* v. *Frere*, 10 East 418.

(*e*) *Ex parte Robinson*, 3 D. and Ch. 376.

(*f*) *Dickson* v. *Cass*, 1 B. and Ad. 343; *Lacy* v. *Woolcott*, 2 D. and R. 458.

Sequestration of firm.

mercantile sequestration; and as this is made public by advertisement in the *Gazette* and other newspapers, it does not seem that any special notice is required to save a partner, or those in his right, from liability for the acts of such of the other partners as may still attempt to carry on the concern (*a*).

Notour bankruptcy of firm.

A more difficult question presents itself, when it is asked whether the bankruptcy of a firm under the Act 1696, c. 5, commonly called *notour bankruptcy*, is sufficient to save from liability for the future acts of the partners without notice. Here there is not necessarily such publication as in the case of sequestration.

Bankruptcy of partner.

As regards the bankruptcy of an individual partner, it must be observed that the law of Scotland differs from that of England, in so far as a company may remain solvent though some of its members become bankrupt; for it is only when a partner is rendered bankrupt for a company debt, that the company becomes bankrupt (*b*).

Sequestration of partner.

When a partner is sequestrated for a private and not for a company debt, his agency to bind the firm of course ceases; and as his sequestration is a public act, it would seem that the solvent partners will no longer be bound by his acts and deeds as in relation to the firm, though no notice have been given to the customers. And by parity of reasoning, it should seem to follow that his trustee will not be bound by the subsequent acts of the remaining partners.

Notour bankruptcy of partner.

Whether the notour bankruptcy of a partner under the Act 1696, c. 5, for a private debt has the same effect, is a much more difficult question.

3. *Retirement of Dormant Partners.*

Retirement of dormant partners.

When a latent partner retires, it is difficult to see why he should be required to give notice to the public in order to protect himself from liability for future obligations of the firm; for the public cannot be relying on his guarantee, seeing they are unaware of his ever having had any connection with the concern. It has accordingly been held in many English cases, that notice to the

(*a*) Sh. Bell's Com. 228. (*b*) 19 and 20 Vict. c. 79, s. 8.

public or customers is not in a case of this kind necessary (*a*). The same rule is also adopted in American law (*b*).

Scotch and English rule not different.

In Scotland the rule is said to be different; and the case of *Kay* v. *Pollock* (otherwise *Hay* v. *Mair*), decided in 1809 (*c*), seemingly overruling the previous case of *Armour* v. *Gibson* (*d*), is generally referred to in support of this view. It is probable, however, that here, as in many other instances, the difference between the two legal systems is more apparent than real. A man may be a dormant and not a secret partner,—that is to say, his name may not appear in the firm, or in the general business of the company,—and yet his existence as a partner may have become known by facts and circumstances. Now it is only where the partnership has been strictly secret, that the English rule is understood to apply (*e*). Accordingly, where the existence of a dormant partner is known to a particular creditor, he will be liable to that creditor, unless due notice has been given of his retirement (*f*).

CASES OF CONTINUING LIABILITY TO BE MADE RESPONSIBLE FOR COMPANY OBLIGATIONS CONTRACTED SUBSEQUENTLY TO DISSOLUTION OR RETIREMENT WITH NOTICE.

Liability continuing subsequent to dissolution.

We have seen that dissolution or retirement, with due notice, has the effect of relieving partners from liability for the subsequent acts of their former copartners, and that in some cases notice is not even necessary for this purpose. Instances, however, do occur in which dissolution or retirement with due notice does not relieve from this liability. These may be classed under the two following heads:—1. When the agency to bind the firm, as regards the partners or any of them, together with their implied guarantee, has not been entirely withdrawn. 2. When, though complete with-

(*a*) *Evans* v. *Drummond*, 4 Esp. 89, 3 Ross L. C. 638; *Brook* v. *Enderby*, 2 Brod. and Bing. 71; *per* Patteson, J., in *Heath* v. *Sansom*, 4 B. and Ad. 177; *Carter* v. *Whalley*, 1 Barn. and Ad. 11, 3 Ross L. C. 635.

(*b*) Story on Part. 159.

(*c*) Jan. 27, 1809, 15 F. C. 102.

(*d*) 1774, M. 14575.

(*e*) See Addison on Contracts, p. 668; *Farrar* v. *Deflinne*, 1 Car. and K. 580; *Powles* v. *Page*, 3 C. B. 16; Smith's Merc. Law 50.

(*f*) *Evans* v. *Drummond*, 4 Esp. 89; *Farrar* v. *Deflinne*, *supra*.

drawal with due notice has taken place, a partner has done something to lead the public to believe otherwise.

When agency not entirely withdrawn.

1. When the agency to bind the firm as regards the partners or any of them, together with their implied and corresponding guarantee, has not been entirely withdrawn.

A very ordinary example of this presents itself in the case of a firm which, notwithstanding its formal dissolution, continues to exist for the purpose of winding up. Here the partnership, and with it the agency of the former partners, at once terminates as to the power of contracting future debts or obligations; but it still continues for the purpose of recovering debts, fulfilling engagements, and calling on the former partners to contribute (*a*). Indeed, unless this were the case, as was observed in *Butchart* v. *Dresser* (*b*), it would often be necessary, at the instant of dissolution, to apply to the Court for a receiver (judicial factor), even although the partners did not differ on any item of the partnership accounts. And the same has been laid down in the law of Scotland (*c*).

Agency implied for winding up.

In accordance with this rule, a retiring partner is liable for the costs of an unsuccessful action brought by the remaining partners for a company debt (*d*). And after dissolution, a former partner has implied authority to bind the firm in so far as may be necessary to settle existing claims, and to complete transactions begun, but not completed prior to dissolution (*e*). Some doubts would seem to have been cast upon this doctrine by the English case of *Pinder* v. *Wilks* (*f*); but, in truth, the circumstances of the case are not very fully reported, and it has been regarded as of questionable authority (*g*).

How limited.

This liability for inchoate acts, completed subsequent to dissolution, also attaches to the representatives of a deceased or retiring

(*a*) *Grant* v. *Chalmers*, 1771, M. 14581; *Douglas, Heron, and Co.*, 1778, M. 14605; *idem* 1792, 1 Bell's Ill. 245, aff. 3 Paton 428; *Royds* v. *Fraser*, 1822, 1 S. 352; *Campbell*, 1830, 8 S. 625, note; *Roger* v. *Jamieson*, 1838, 16 S. 418; *Thom* v. *North British Bank*, 1850, 13 D. 134; *W. of Scot. Mall. Iron Co.*, 1855, 17 D. 461.

(*b*) 10 Ha. 453.

(*c*) See *Drysdale* v. *Lawson*, 1842, 4 D. 1061; *Young* v. *Collins*, 1852, 14 D. 540, reversed 1 Macq. 385; *Bell* v. *Williamson*, 1857, 19 D. 704.

(*d*) *Kinnear* v. *Thomson*, 1830, 8 S. 512.

(*e*) *Butchart* v. *Dresser*, 4 De G. M. and G. 542; *Smith* v. *Stokes*, 1 East 363; *Morgan* v. *Marquis*, 9 Ex. 145; *Graham* v. *Whichelo*, 1 C. and M. 188; *Ault* v. *Goodriche*, 4 Russ. 430.

(*f*) 5 Taunt. 612, and 1 Marsh. 248.

(*g*) Coll. 372.

partner; and this was so in the Roman law (*a*). But this liability does not extend to any acts which are not strictly necessary for winding up (*b*); and any abuse of the agency implied for that purpose will justify the appointment of a judicial factor (*c*).

Bills and notes.

The implied agency does not validate a draft, acceptance, or indorsation, made by one partner after dissolution so as to bind the others; and it implies no authority to do so, that the notice of dissolution empowered one partner to receive the assets and pay the debts of the company (*d*). In order to bind the firm after dissolution, all the partners must join in the draft, acceptance, or indorsement, or it must be signed by some person specially authorized to act for them (*e*).

When a skeleton or blank bill has been signed by the firm, and dated prior to dissolution, though filled up subsequently to that event, it has been held to bind the partners (*f*). And when, prior to dissolution, two partners drew a bill payable to their own order, and after dissolution one of them indorsed it to a party who knew of the dissolution, the indorsee was held entitled to recover against both partners (*g*).

Agency conferred on one partner.

It sometimes happens that the agency of some one or more of the partners is specially arranged to continue for certain purposes after dissolution. In all such cases the exercise of this power within its prescribed limits will bind the late members of the firm. In *Burton* v. *Issitt*, one of two partners was specially authorized to use the name of the other in prosecuting for recovery of partnership property (*h*). This was held to validate promissory-notes issued in the name of the firm so as to bind the retiring partner. The same was held in *Smith* v. *Winter*, where the continuing partner had express permission to use the name of his former associate (*i*).

When the public are misled.

2. When, notwithstanding complete withdrawal of agency and guarantee has taken place with due notice, a partner has done something to lead the public to believe otherwise, he may still remain liable for subsequent acts of his former partners.

(*a*) Dig. lib. xvii. t. 2, l. 40.
(*b*) *Kilgour* v. *Finlyson*, 1 H. Blacks. 156; *Abel* v. *Sutton*, 3 Esp. 108.
(*c*) *Young* v. *Collins*, as reversed in House of Lords, 1 Macq. 385.
(*d*) Cases last cited; and *Snodgrass* v. *Hair*, 1848, 8 D. 390.
(*e*) Same cases, and *Wrightson* v. *Pullar*, 1 Stark. 375.
(*f*) *Usher* v. *Dauncey*, 4 Camp. 97, 1 Ross L. C. 165.
(*g*) *Lewis* v. *Reilly*, 1 Q. B. 349.
(*h*) 5 B. and Al. 267.
(*i*) 4 M. and W. 454.

Holding out after notice.

The most common example of this occurs where a partner, though he has retired and given notice of his retirement, still continues to hold himself out as a partner. In *Brown* v. *Leonard* (*a*), one of two partners retired, and a promissory-note was subsequently issued in the name of him and the two remaining partners. The plaintiff, before receiving the note, had notice from the retiring partner that he had left the concern; but he at the same time stated that his name was to continue for a certain time. He was found liable. In *Staples* v. *Ely* (*b*), a retired partner who allowed his name to remain on a cart, and over the old place of business, was found liable for the negligence of a driver of the cart in the employ of the firm.

Authorizing use of name.

It has been said that a retired partner does not incur responsibility in this manner, unless his name has been used with his knowledge and authority. And such a view would certainly appear to be in accordance with justice and equity. The well-known case of *Williams* v. *Keats* seems, however, to countenance the opposite doctrine (*c*). In that case there was no evidence that the retired partner had authorized the continuance of his name, beyond the fact that he had not prevented it.

Practical rules.

To obviate the risk of liabilities of this kind, it should be made matter of special arrangement, prior to dissolution or retirement, that none of the partners shall continue the business in name of the others. For while in actions instituted for the purpose of having a partnership dissolved, or for distribution of the partnership funds after it has been dissolved, the courts have interfered to prevent partners from carrying on the concern for any other purpose than that of winding up (*d*), they have refused to restrain a surviving partner from carrying on business in the name of a deceased partner, when no agreement against his doing so could be produced (*e*).

(*a*) 2 Chitty 120.

(*b*) 1 Car. and Pa. 614. See also *Dolman* v. *Orchard*, 2 Car. and Pa. 104; *Emmet* v. *Bradley*, 7 Taunt. 600.

(*c*) 2 Stark. 290. See *Gardner* v. *Anderson*, 1862, 24 D. 315.

(*d*) See *Webster* v. *Webster*, 3 Swanst. 490; *Lewis* v. *Langdon*, 7 Sim. 421; *De Tastet*, Jac. 516.

(*e*) *Farr* v. *Pearce*, 3 Madd. 74; *Davies* v. *Hodgson*, 25 Beav. 177.

CHAPTER XVIII.

LIABILITY OF MEMBERS OR SHAREHOLDERS FOR THE DEBTS AND OBLIGATIONS OF INCORPORATED COMPANIES.

Difficulties attending the elucidation of this subject in the law of Scotland.

THE non-recognition of a separate person in unincorporated associations, though justly regarded as in many respects an imperfection in English law, carries with it one great advantage, namely, that of broadly distinguishing between corporations and mere partnerships. The habit of attributing to the latter a *quasi* person tends greatly to obscure this distinction in the mind of the Scottish lawyer, and has undoubtedly led to much confusion of thought in relation to the nature and legal incidents of corporations. We have had occasion to notice this in previous chapters; but there is perhaps no branch of the subject in which it is more observable than that now under consideration. To escape from this tendency, and to obtain clear views of the nature of the liabilities which may attach to the members of incorporated companies as contradistinguished from those which are inseparable from the partnership relation, we should recommend that the following principles and considerations be kept steadily in view.

General principles to be kept in view.

Corporations are in contemplation of law proper persons, capable of sustaining the characters of debtor and creditor, of holding property, and of suing and being sued, like ordinary individuals, for all the intents and purposes of their creation. Partnerships, again, are possessed merely of a *quasi* personality, and of this only in a limited and special sense; their rights and obligations involve those of their members, and they cannot appear judicially without joinder of the latter in some form or other. In all obligations incurred by corporations, the corporation is itself the true debtor; the creditor deals with it as an individual, and must look for pay-

ment to its property or assets alone, the corporators *as such* being neither its co-obligants nor its sureties. Obligations, on the other hand, incurred by partnerships, bind not only the *quasi* person of the firm, but each and all of the partners jointly and severally, and render them liable *singuli in solidum* to the utmost extent of their means and estate. In corporations, membership does not *per se* create liability for company obligations; in partnerships, it involves this liability without limit.

Liability arising from contract.

But though liability of members for company debts is not one of the *naturalia* of a corporation, there is nothing to prevent the members any more than strangers from undertaking such liabilities to any extent and under any conditions they may see fit; and when obligations of this kind are validly constituted, they will receive equal effect with those arising under any other special contract.

Contribution.

Now, it is obvious that associations incorporated for the purposes of gain must, like ordinary companies, be possessed of a fund to meet the expenses of the undertaking; and this, except in very exceptional cases, can only be raised by contribution among the members. This contribution may assume various forms. It may consist of a certain fixed sum payable on each share, or it may take the form of a guarantee, undertaken by each member, to a certain amount, or to the full extent of the liabilities to be incurred by the corporation. The obligation to contribute may be created by special contract, either before or after incorporation; and when properly constituted, it will bind all such as have contracted, whether members or strangers. But as the possession of a common fund is absolutely necessary to the success of the undertaking, an obligation to contribute to such an extent and in such a manner as the promoters deem advisable is almost always inserted as a condition of membership in the instrument of incorporation. This condition, coupled with acceptance of shares, forms a special contract binding on every member, and at once creating and defining his liability to contribution.

Liability for contribution arises not *ex lege* but *ex contractu*.

This liability to contribution is obviously something entirely different from the unlimited liability incurred by partners. It does not arise *ex lege*, but is the creature of the special contract by which it is expressly limited and defined. Hence it can be rendered available and enforced in no other form and to no other

effect than those stipulated; and when the covenanted amount of contribution has been exhausted it entirely ceases, however large may be the existing debts or obligations of the corporation.

Ascertained by incorporating instrument, or by separate contract.

If the views here enunciated be correct, it follows that to ascertain in any given case whether and to what extent the members of an incorporated association are liable for its debts and obligations, when such liability terminates, and in what manner it may be rendered available to creditors, recourse must be had to the provisions of the instrument of formation, viz. charter, special act, special act combined with the Consolidation Act of 1845, or memorandum and articles of association in combination with the Registration Acts. Liabilities arising from separate contracts must of course be determined by reference to the contracts themselves.

Companies Act of 1845.

By the Companies Clauses Consolidation (Scotland) Act it is provided as follows: 'If the company shall be incorporated, no person or corporation, nor the estate, real or personal, of any such person or corporation, who is or shall be a proprietor of the said incorporated company, shall be liable for or charged with the payment of any debt or demand whatsoever, due or to become due by or from the said company, beyond the extent of his or their share in the capital of the said company' (sec. 37). And with respect to the means competent to creditors of the company to render this limited liability available against shareholders, it is provided, that 'if any legal diligence or execution shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy under such diligence or execution, then such diligence or execution may be used against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up; and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times to inspect the register of shareholders without fee' (sec. 38).

Import of these provisions.

It is clear from these provisions, that the members of companies incorporated by special act under this general statute incur no liability for company debts beyond the amount of their contributions, which is the amount of the company's capital remaining

unpaid on their respective shares; and it is further evident that this liability can only be made available to the creditor after diligence has been used against the company property without obtaining sufficient to satisfy the debt.

What is sufficient discussion of the company property.

What amount of diligence it is necessary to have used against the company property, so as to entitle a creditor to proceed against an individual shareholder, does not seem to have been as yet settled by any decision of a Scotch court. In interpreting the corresponding provision in the English Act (8 and 9 Vict. c. 16, s. 36), it seems to have been held, that where the company is not possessed of available real property, a return of *nulla bona* on a *fieri facias* directed against the company is a sufficient ground for allowing *scire facias* to issue against a shareholder (*a*); and even when the company has been possessed of nothing, the courts have not always required the creditor to exhaust his remedy by *eligit* where the property to be extended was small in proportion to the debt, and payment could therefrom only be obtained, in any circumstances, after the elapse of a considerable time,—the view acted upon in England being, that present or immediate payment was that contemplated in the Act (*b*). But it must be observed that the shareholder can only be proceeded against by *scire facias*, which is a diligence by way of action, and must set forth the grounds upon which the defendant is sought to be made liable on the judgment obtained against the company. The shareholder may state any relevant defence he thinks proper, and on issue being joined, the case proceeds to trial; so that it is hardly possible that he can be subjected in payment of what either has been or might be obtained from the company funds (*c*).

English precedents.

Analogy in Scotland.

Following out this analogy, it should seem that if in Scotland the corporation is not possessed of heritable property, a charge followed by a poinding of the company goods, which proves insufficient to satisfy the debt, will be enough to meet the statutory requirement, and to entitle the creditor to recourse against a shareholder. When the corporation possesses real property, adjudication

(*a*) *Rustrick* v. *Derbyshire Ra. Co.*, 9 Ex. 149; *Hitchins* v. *Kilkenny Ra. Co.*, 15 C. B. 459. See Lindley, p. 454.

(*b*) See *Addison* v. *Tate*, 11 Ex. 250. See Lindley 453.

(*c*) See previous cases, and Lindley 442.

must be resorted to; but if the subjects adjudged be so small that present payment cannot be obtained in this manner, it is probable that the creditor would be allowed to proceed against a shareholder for the balance of his debt without delay.

Charge must be given of new to shareholders.

When in Scotland a charge has been given to a firm or copartnery, it forms a sufficient warrant for diligence against any one of the partners, and the only remedy is by suspension when the evil done is perhaps irremediable. Fortunately, there is no authority for extending this very loose and dangerous practice to the case of corporations; and, therefore, if it be determined to proceed against a shareholder, in consequence of diligence against the company having proved unproductive, a new charge must be given him individually. This procedure supplies, though in a somewhat imperfect form, the place of the *scire facias*, by enabling the shareholder to ascertain in a suspension that the corporation property has been fully exhausted, and that he is not called upon to pay more than is really due, before diligence proceeds against either his goods or his person.

Limitation of liability to contribute.

This liability to contribute towards liquidation of the corporation debts is limited in various ways. 1. It is only available after exhaustion of the company property; 2. It cannot exceed the amount still remaining unpaid on the shares; and 3. It applies only to the holder of shares, and ceases the moment he has *de facto* ceased by transfer or otherwise to be a shareholder. It has been decided in England, that it only attaches to such persons as hold shares at the time when execution against the company is found to be ineffectual, and therefore does not apply to such as had relinquished their shares before that time, even though they should have been shareholders both when judgment was obtained and execution had issued against the company (*a*). It has been decided, however, that the register, though conclusive, is not the only evidence of membership; and therefore, when a creditor was prevented from inspecting the register, he was allowed a *scire facias* against a person who he swore was a shareholder to the best of his belief, that belief being founded on information received from the company officials (*b*).

Register not the only evidence of membership.

(*a*) *Nixon* v *Green*, 11 Ex. 550; *Nixon* v. *Brownlow*, 3 H. and N. 686.

(*b*) *Rustrick* v. *The Derbyshire Ra. Co.*, 9 Ex. 149.

Winding up does not stop recourse against a shareholder.

The mere fact that the company is in the course of being wound up, and that the creditor will consequently be paid in course of time, does not preclude him from proceeding against a shareholder as allowed by the statute (*a*).

Companies Act of 1862.

The Companies Act of 1862 provides, as has been already seen, for the formation by registration of incorporated companies, both with limited and unlimited liability. With respect to such as are registered with limited liability, it provides that where the limitation is by shares, no member shall be required to contribute beyond the amount unpaid on his shares (sec. 38, No. 4); and that where the limitation is by guarantee, no contribution shall be required from any member exceeding the amount of his guarantee (sec. 38, No. 5). If the company is not registered with limited liability, the members are liable to be made contributories to the full extent of its debts and obligations (sec. 38). It must be observed, however, that even in this last case the members are in a very different position from that occupied by the partners of an unincorporated firm or company. The latter are liable *singuli in solidum*, and any one of their number may be proceeded against by a creditor for the whole of such debts as he has constituted against the concern; whereas the former are only liable as joint contributories, and that liability can only be made available by winding up the concern. Therefore no decree against the company will warrant diligence against any of its members. In this respect, members of companies formed under this Act, whether limited or unlimited, are more favourably situated than shareholders in companies formed under the Companies Clauses Act of 1845.

Loss of privilege.

This important privilege may, however, be lost in certain circumstances. 1. If the company carries on business for six months with less than seven members, every member aware of the fact becomes liable *singuli in solidum* for all debts contracted during that period (sec. 48). 2. Persons signing any bill of exchange, promissory-note, cheque, or order for money or goods, in which the full name of the company is not used as directed, become liable for the full amount unless relieved by the company (secs. 41 and 42). 3. Existing banking companies, which register as limited companies without giving due notice to the customers as required

(*a*) *Morisse* v. *The Royal British Bank*, 1 C. B. N. S. 67.

by the Act, remain liable to such customers as have not received notice, in the same way as if no registration had taken place (sec. 188).

Termination of liability.

The liability of members to be made contributories does not terminate by the mere fact of their ceasing to be members. On this subject the statutory provisions are somewhat peculiar. By sec. 38 it is declared—1. That no past member shall be liable to contribute to the assets of the company, if he has ceased to be a member for one year or upwards prior to the commencement of the winding up. 2. That no past member shall be liable to contribution, in respect of a debt contracted after his membership ceased. 3. That no past member shall be liable to contribute, unless it appears to the Court that the existing members are unable to contribute the amount required to liquidate the company liabilities.

Liability of members of companies existing prior to registration.

It must be observed, that when companies previously existing are registered under the Act of 1862, whether with or without limited liability, the liability of such of the members as were liable for debts contracted prior to registration is in no way diminished. The only alteration appears to be, that whereas the creditor might formerly have proceeded against them directly on constituting his debt against the company, he must now take the more orderly method of rendering their liability available in a winding up of the concern (sec. 196, No. 5).

7 Will. IV. and 1 Vict. c. 73.

Companies governed by the Letters Patent Act, 7 Will. IV. and 1 Vict. c. 73, though possessed of some of the privileges, hardly deserve the name, of corporations. The liability of the shareholders is limited or unlimited, according to the letters patent conferred on the company (secs. 21 and 24); but the Act does not make provision for regular winding up and enforcing contribution by calls equally made. It would therefore rather seem that, in the absence of some provision in the letters patent to the contrary, a creditor who has obtained decree against the company may use diligence against any one of the members, as in the case of an ordinary partnership.

CHAPTER XIX.

LIABILITY OF TRUSTEES HOLDING SHARES IN A PARTNERSHIP OR COMPANY.

In dealing with this question, a distinction must be made between private partnerships and public companies. In the former, the rights as well as the liabilities of a member attach to him as an individual specially selected as a *socius* by his copartners; in the latter, they attach to the shares, by whomsoever they may chance for the time being to be held.

Private firms. Questions with the public.

In the case of private partnership, persons incur unlimited liability to the public not only by being *de facto* partners, but also by holding themselves out as such, or otherwise assuming the responsibilities of *quasi* partnership. In a question, therefore, with the public creditor, there can be no doubt that trustees standing in any of these positions incur a full personal liability. The public have not in general the means of knowing, and they are not bound to inquire into, any latent equities which may exist in the case of persons occupying ostensibly the position of partners (*a*). Yet if it could be shown, in the case of a particular creditor, that at the time his debt was contracted with the firm he was aware that a partner was such in a fiduciary character only, it would seem equitable to restrict the recourse to the trust funds.

Questions *inter socios*.

When the question of liability arises *inter socios*, the liability of a trustee to contribute will obviously depend on what arrangement was made between him and his fellows,—whether, in short, they

(*a*) *Gordon* v. *Anderson*, 1862, 24 D. 315. See *per* Lord Kinloch in *Lumsden* v. *Buchanan*, 1864, 2 Macph. 704; *per* Lord Justice-Clerk, same case, p. 711; *ex parte Garland*, 10 Ves. 110; *ex parte Richardson*, 1 Buch. 202. M'Laren on Trusts ii. 12.

agreed to accept him as a partner in his personal or in his fiduciary character. The presumption of law would seem to be for the former, and the *onus* of proving the latter will lie on the partner (*a*).

Public companies. Questions with the public.

In public companies the liabilities of trustees taking shares will, in a question with the world, fall to be regulated by the same principles as we have already seen to be applicable in the case of private partnerships; that is to say, they will be held to have bound themselves as ordinary shareholders, whatever liabilities that relation may involve.

Questions *inter socios*.

When the question arises *inter socios*, the presumption for personal liability will be almost as strong as when it arises with the public creditor. The reason of this is, that in all that concerns transference of shares or admission of members, the shareholders have as little to do as the public. The management of such matters is committed to the directors, who must act in accordance with the constitution of the company. Now, the power to admit members with a liability limited to that of trustees, is in fact a power to admit some persons with privileges not possessed by the others, or rather with a right of indemnity against the others for all losses and debts of the concern beyond the amount of the trust funds,—a power which never can be presumed, and which could only be validly exercised where it was specially conferred in the instrument of formation. It would therefore seem that an arrangement by which the liability of certain shareholders is *inter socios* limited to that of trustees, can only be validly entered into when the directors have special powers to that effect, or when it has received the sanction of the whole body of shareholders, or at least of a general meeting (*b*).

When shareholders are entered on the register as trustees *eo nomine*, this is intended merely to mark the property vested in them as belonging to the trust estate, and is quite consistent with their personal liability either to the company or its creditors (*c*).

(*a*) See *per* Lord Justice-Clerk in *Lumsden* v. *Buchanan*, *supra*, and opinions of the judges generally.

(*b*) *Lumsden* v. *Buchanan*, as revd. on appeal June 22, 1865; and see, in particular, the opinion of the Lord Justice-Clerk, which was adopted in the House of Lords, and which contains a full exposition of the legal principles involved in questions of this nature, 1864, 2 Macph. 709. See also *Redfearn* v. *Sommervail*, 1813, 5 Paton 707, 1 Dow 50; and *Allan* v. *Turnbull*, 1834, 11 S. 487, 7 W. and S. 281.

(*c*) *Per* Lord Westbury, Ch., in *Lumsden* v. *Buchanan*, *supra*. See also, on this subject generally, *Wight-*

Liability of *cestui que trustent.*

It has been held in England, that the *cestui que trust* of shares in an unincorporated company is liable as a *quasi* partner to the creditors of the company (*a*); but in corporations, this liability, whatever it may be, attaches to the ostensible holder of shares only (*b*). Even in this latter case, however, the beneficiary may be made a contributory, if it can be shown that he procured shares to be placed in the name of nominees of his own, with the fraudulent purpose of saving himself from liability (*c*).

Liability to indemnify trustee.

Beneficiaries, or *cestui que trustent*, may in some cases be liable to indemnify the trustee, but with that the company have in general no concern (*d*). The latter may, however, incur this liability by immixing themselves in the transaction, or by unreasonable conduct. Thus A. purchased railway shares, and took the certificates in name of B. He afterwards pledged them with a bank in security of advances, representing B. as merely his trustee. A. became insolvent, and B. being required by the railway company to pay calls, requested the bank either to pay them, or to deliver the certificates to him, so that he might sell them. The bank having refused to do either, it was held that they were identified with A., and liable to relieve B. (*e*).

Statutory provisions.

By the Companies Clauses Act, 1845, sec. 21, it is provided that the company shall not be bound to regard any trust, whether express, implied, or constructive, to which any of the shares may be subject; and by sec. 30 of the Companies Act of 1862 it is provided, that no notice of any trust shall be entered in the register in the case of companies registered in England or Ireland. The provision, however, does not extend to Scotland,—a peculiarity much to be regretted.

man v. *Monroe*, 1 Maule and Sel. 412; *King* v. *Thom*, 1 T. R. 488; *Childs* v. *Morrins*, 2 Br. and Bi. C. 460; *Bradley* v. *Heath*, 3 Sim. 543; *Appleton* v. *Binks*, 5 East 148; *Labouchere* v. *Tupper*, 11 Mo. P. C. 198; *Liverpool Bank* v. *Walker*, 4 De Gex and G. 24; *Newcastle Bank Co.*, 17 Beav. 203; *Armstrong*, 1 De Gex and Sm. 565; *Hall*, 3 De Gex and Sm. 80, and 1 M'N. and Gord. 307; *Phœnix Life Assur. Co.*, *Hoare's* case, 2 J. and H. 229.

(*a*) See *Goddard* v. *Hodges*, 3 Tyrw. 209.

(*b*) *Newry Ra. Co.* v. *Moss*, 14 Beav. 64.

(*c*) *Costello's* case, 2 De G. F. and J. 302; *Alexander's* case, 9 W. R. 410; *Budd's* case, 10 W. R. 51; *Hatton's* case, 10 W. R. 313; *De Pass's* case, 4 De G. and J. 544.

(*d*) See *Bunn's* case, 2 De G. F. and J. 275.

(*e*) *Barron* v. *National Bank*, 1852, 14 D. 565.

CHAPTER XX.

LIABILITIES OF PARTNERS AND DIRECTORS CONSIDERED AS AGENTS AND TRUSTEES FOR THE COMPANY.

Origin of this liability.

We have now considered somewhat fully the liabilities which partners and shareholders incur for such obligations as are constituted against the firm or company of which they are members; but there is another class of liabilities which may be incurred both by partners and managing officials, not only to the company but to the world, and which arise from the fact that partners in private firms and managing officials in larger associations hold the character of agents and trustees for the society. These liabilities have already been noticed as they incidentally presented themselves; but as the subject is one of considerable importance, it is proposed to examine the principles by which it is regulated more connectedly and in detail in the present chapter. We shall first consider these liabilities as they arise in the case of partners, and shall then advert to the corresponding liabilities which may be incurred by directors and other managing officials.

I. LIABILITIES OF PARTNERS.

Twofold liability of partners.

We have already seen that the partners of a private firm partake of the characters both of trustees and agents for the concern: Trustees, to whose care its interests are confided; Agents, by the intervention of whom it acts and transacts with the public. The consequence of this is, that partners may incur a twofold liability; *inter socios* on the one hand, and to strangers on the other. 1. If they abuse the powers of agency or trust with which they are charged, so as to sacrifice the common interest, or to involve the society in losses or liabilities; if they set at nought the interests of

the concern in order to further their own, or appropriate to themselves that which either belonged to or ought to have been secured for the company; if they neglect their duties as partners to such an extent as amounts to a fraud on their copartners, and thereby seriously injure the common interests;—in these and the like cases they become liable to indemnify the company, and may be proceeded against at its instance, or at the instance of any partner who deems himself aggrieved. 2. If a partner, taking advantage of his connection with the company, enters into transactions with a stranger, which, from being *ultra vires* of his agency, or for some other reason, do not bind the company, and the stranger thereby suffers loss or damage, the partner incurs a personal liability to the stranger, provided the latter have not been privy to a fraud sought to be practised on the company.

Liability to the company, or *inter socios.*

1. *Liability to the Company.*—In the English case of *Bury* v. *Allen* (*a*), it was stated by the Court: 'Suppose the case of an act of fraud, or culpable negligence, or wilful default by a partner during the partnership, to the damage of its property or interests, in breach of his duty to the partnership; whether at law compellable or not compellable, he is certainly in equity compellable to compensate or indemnify the partnership in this respect.' The case of *Campbell* v. *Campbell* (*b*) is also a strong example of the application of the principles here enunciated. In that case, one of the partners of a distillery company having been found liable in Excise penalties in consequence of the others having without his knowledge engaged in illicit distillation, they were held bound to indemnify him in full. And where, again, a partner exceeded the limits of his agency, and thereby involved the other partners in heavy responsibilities, they were found entitled to relief in full against him (*c*).

Liability of partners benefiting themselves at the expense of the company.

Partners have no right to take advantage of their connection with the company so as to obtain for themselves advantages, or make acquisitions which, if secured at all, ought to have been acquired for the company (*d*). If they do so, they must either communicate to the company the advantages or property so acquired,

(*a*) 1 Coll. 604.

(*b*) 1834, 12 S. 573; 1 Rob. App. 4.

(*c*) *Robertson* v. *Southgate*, 6 Ha. 540. See also *re Webb*, 2 B. Moore 500; *Stalsmidt* v. *Lett*, 1 Sm. and G. 415; *M'Ilreath* v. *Margetson*, 4 Doug. 278.

(*d*) See *Wallace* v. *Campbell*, 1. S. 53 and 509, 2 S. Ap. 467 (1824); and *antea*, p. 183.

or else they must indemnify the company to the full extent. This was expressly laid down in the late case of *Pender* v. *Henderson and Co.* (*a*), in which the authorities, both Scotch and English, were fully examined. It was stated from the bench to be an indisputable principle of partnership, 'that a partner is bound to communicate to his copartners any benefit or advantage obtained by him in the affairs of the copartnery;' and 'that a partner, in this respect, stands on the same footing with a trustee or tutor, or other person holding a confidential position.'

Modes of obtaining redress.

In cases of this kind the offending partner or partners may be proceeded against not only at the instance of the company or firm, but in the name of any single partner who considers himself aggrieved. If this were not so, a majority of wrong-doers might set a minority at defiance (*b*). If the offending partners are in the minority, it seems to be the proper course to raise the action in the company name; if, again, those seeking reparation be a minority, the action should be libelled in their individual names. But it must be observed that the firm itself ought in no case to be made the defender, however numerous the wrong-doers may be; for this would not only be incorrect in theory, but would render the pursuers themselves contributories in any decree for damages which might be obtained: in other words, the decree being obtained against the firm, the pursuers could only claim payment under deduction of their individual liabilities to contribution as being themselves partners.

Liability to strangers.

2. *Liability to the Public.*—If a person represent himself to be the agent of another, and in that character induce a third party to contract with him, and it afterwards turn out that the contract cannot be enforced against the alleged principal in consequence of its being *ultra vires* of the agency, it is plainly equitable that the agent should indemnify the other party for any loss or damage which he may have thereby sustained; and the case will be all the

(*a*) *Pender* v. *Henderson and Co.*, 1864, 2 Macph. 1428. See *Featherstonehaugh* v. *Fenwick*, 17 Ves. 298; *Alder* v. *Fouracre*, 3 Swa. 489; *Clegg* v. *Fishwick*, 1 M. and G. 294; *Clements* v. *Hall*, 24 Be. 333; *Inglis* v. *Austine and Others*, 1624, M. 14562; Ersk. iii. 3, 20; 2 Bell's Com. 614; Coll. 118-122; *Bentley* v. *Craven*, 1853, 18 Be. 75; *Fawcett* v. *Whitehouse*, 1 R. and M. 132; *Beck* v. *Kantorowicz*, 1857, 3 K. and J. 230; *Habkin* v. *Hog*, 1715, Rob. App. 147. See *antea*, pp. 183 *et seq.*

(*b*) *Campbell* v. *Campbell*, 1834, 12 S. 573, 1 Rob. App. 1. See *Tulloch* v. *Davidson*, 1858, 20 D. 1045, aff. 1860, 22 D. (H. of L.) 7, 3 Macq. 783; *Leslie's Reps.* v. *Lumsden*, 1851, 14 D. 213.

stronger if it shall appear that the alleged agent was himself the principal (*a*). This doctrine applies in its fullest extent to the case of partners, or of persons representing themselves to be partners, and inducing the public to enter into transactions with them as acting for the company. In such cases the partner is generally guilty of a fraud, intended to be practised not only on the public, but also on the firm, in order to obtain goods, money, or other advantages for his own purposes, on the faith of a credit which he has no right to adhibit. On this ground alone he is justly liable in reparation; and even if, in consequence of his implied agency, the firm should be held bound, this would not relieve him of personal liability; it would only transfer the *jus exigendi* from the public to the firm (*b*). Yet it sometimes happens that a partner enters into a transaction of this kind in perfect *bona fides*, imagining, for example, that he possesses more extensive powers to bind the firm than is actually the case, or thinking that the firm will ratify or adopt his proceedings. In such cases, if the transaction is ultimately found not to be binding on the firm, there seems to be no good reason to suppose that a stranger who has suffered thereby shall not have his claim of indemnity against the partner. He was entitled to rely on the representations of the partner; and though the latter may have committed an innocent mistake, he has his own precipitancy to blame for entering into a transaction without ascertaining beforehand the limits of his authority. When the partner and the stranger with whom the transaction was entered into have been both engaged in seeking to practise a fraud on the company, the stranger will have no redress against the partner; for it is a well-established principle in law, that there can be no contribution among wrong-doers.

Bona fides not a complete defence.

Persons frequently induce others to enter into partnership with them, or to join a firm or company of which they are members. When, in doing this, they make false and fraudulent representations as to the advantages to be derived from entering into the partnership or joining the concern, or conceal liabilities or other disadvan-

Liability for inducing others to enter the concern.

(*a*) See pp. 245–6.

(*b*) See, as to this, *Finlayson* v. *Braidbar Quarry Co.*, 1864, 2 Macph. 1297; *Ross* v. *Young and Others*, 1831, 9 S. 275; *Hadden* v. *Ayres*, 5 E. Jur. N. S. 408, Q. B.; *Barker* v. *Allan*, 5 H. and N. 61.

tages under which the concern labours, the contract may in general be reduced at the instance of the party aggrieved (*a*). But in addition to this, he has also a claim against the partner by whose misrepresentations he was deceived, to be indemnified for all loss and damage he may have thereby sustained (*b*).

II. LIABILITY OF DIRECTORS.

The principles which we have been now considering as regulating the liability of partners considered as agents and trustees for the firm, to be made responsible to their copartners and the public for the consequences of their malversation or unauthorized acts, apply with perhaps still greater force in the case of directors and other officials to whom the management of public companies is entrusted. These functionaries are in a very special manner charged with the duty of watching over the interests of their companies, and are expected to do their utmost to further their welfare; and in so far as the public are concerned, they are inexcusable if they do not acquaint themselves with the nature and extent of the powers with which they are entrusted. The cases have accordingly been very numerous in which directors and other managing officials have been found liable to indemnify the company or the shareholders on the one hand, and the public on the other, for the consequences of their improper conduct. In examining these authorities we shall, as before, consider first the liability of directors, etc., to the company or shareholders, and next their liabilities to the world.

Liability to the company.

1. *Liability of Directors, etc., to the Company or the Shareholders.* —The nature of this liability is similar to that which exists between an agent and his principal, a servant and his employer, beneficiaries and trustees; and it may be briefly stated as follows:—If by negligence, recklessness, dereliction of duty, or unwarrantable conduct on the part of these officials, the company or the shareholders are involved in loss, or their interests are sacrificed, they become liable to be sued for indemnity at the instance of the company, or of any shareholder who is aggrieved thereby.

Illustrations.

In *Campbell* v. *Campbell*, before referred to, the manager of a

(*a*) See 'Dissolution.'

(*b*) See *Stainbank* v. *Fernley*, 9 Sim. 556; *Seddon* v. *Connell*, 10 Sim. 58 and 79, and previous cases.

distillery company was found liable in indemnity to a partner for the liability incurred by him in consequence of the company having been engaged in illicit distillation; and the fact that the other partners had approved of the act was found to be no defence (*a*). The case of the *North of Scotland Banking Co.* v. *Thomson* (*b*) may also be referred to as an instance of a director of a bank being sued by the company for malversation in office, on the allegation that he had taken advantage of his position as director to act prejudicially to the interests of the company, on several occasions, when his own private interest was concerned. The report is important, as containing the form of issues adjusted to try the question. The following averments may here be instanced, as affording illustrations of what will be held relevant to maintain an action at the suit of the company or the shareholders against directors for malversation:—That they had been guilty of abuse of power and fraud in the management of the business; that they had failed or neglected to perform the duties of management, and had delegated them to the manager, while by holding office they professed to be discharging these duties themselves; that they had made reckless advances of enormous extent, by way of discounting bills to parties who were unworthy of credit (*c*).

Charges must be important and specific.

But it must be observed, that since much is necessarily confided to the discretion and judgment of directors, every allowance will be made for mistakes or errors in judgment, where there is no good reason to suspect corrupt motives or culpable dereliction of duty. Hence it is not every proceeding or omission which, judging after the event, may appear to have been improper, that will ground liability. The acts or omissions complained of must be of a kind which plainly indicates fraud or culpable dereliction of duty; and to make the action relevant, their nature and the circumstances under which they took place must be clearly and specifically averred (*d*).

Liability to the public.

2. *Liability of Directors, etc., to the Public.*—As directors and other managing officials of public companies are not only their

(*a*) 1834, 12 S. 573. See M'L. and Rob. 387, 1 Rob. 1.

(*b*) 1854, 16 D. 1011.

(*c*) *Western Bank* v. *Bairds*, 1862, 24 D. 859; *Collins* v. *North British Bank*, 1850, 13 D. 349, 1 Macq. 369.

(*d*) Same cases; and see *Inglis* v. *Douglas*, 1861, 23 D. 561; *Tulloch* v. *Davidson*, 20 D. 1045, 1319, aff. 1860, 22 D. (H. of L.) 7, 3 Macq. 783; *Nat. Ex. Co.* v. *Drew*, 1860, 23 D. 1; *Leslie* v. *Lumsden, etc.*, 1856, 18 D. 1046; *MacAlister*

accredited agents, but the parties to whom the whole of the executive management is entrusted, the public as well as the shareholders are entitled to expect that these officials will faithfully discharge their duties, and make no representations regarding the company or the state of its affairs which are inconsistent with the fact. It has accordingly been held, that when directors published fraudulent reports as to the state of the company affairs, calculated to raise the credit of the concern, and to induce strangers to become shareholders, they were liable in damages to any one purchasing shares and suffering loss thereby, even although the shares should have been purchased neither from the company nor from any of themselves who prepared the reports. And to this effect it was further held to be sufficient publication, that the reports in question were presented to or circulated among the shareholders (*a*). To ground this liability, it is not necessary that the directors shall be proved to have been guilty of direct fraud; it is enough that they have been chargeable with gross neglect of duty in making proper investigations into the state of the company affairs, and with reporting notwithstanding to the shareholders that a proper investigation had been made (*b*). Nor does it make any difference that the parties imposed upon were already shareholders, and had only been induced to involve themselves still further by the purchase of additional shares; for the management of the company being entirely confided to the directors, a shareholder is in a matter of this kind as much a stranger as one of the public (*c*).

It sometimes happens that directors or other managing officials enter into contracts with strangers as for the company, but which, from being *ultra vires* of their agency or of the constitution of the company, do not bind it. If, in such circumstances, the stranger suffers loss or damage, the directors by whom he was misled are justly liable to him in indemnity (*d*). This, however, would hardly

v. *Alexander*, 1843, 5 D. 580; *Maxton* v. *Muir*, 1845, 7 D. 1006; *Graham* v. *North British Bank*, 1849, 11 D. 1165; *Baird* v. *Ross*, 1855, 2 M'Q. 61.

(*a*) *Tulloch* v. *Davidson*, 1858, 20 D. 1045, aff. 1860, 22 D. (H. of L.) 7, 3 Macq. 783. See also *Dobbie* v. *Johnstone*, 1859, 21 D. 624; *Inglis* v. *Douglas*, 1861, 23 D. 561; *Cullen* v. *Johnstone*, as revd. 1862, 24 D. (H. of L.) 10, 4 Macq. 424.

(*b*) *Nat. Ex. Co.* v. *Drew*, 1860, 23 D. 1; *Dobbie* v. *Johnstone*, *supra*; *Inglis* v. *Douglas*, *supra*; *Cullen* v. *Johnstone*, *supra*.

(*c*) *Cullen* v. *Johnstone*, *supra*.

(*d*) *M'Ilwham* v. *Johnstone*, 1852, 14 D. 322.

hold good in the case of shareholders; for it might be truly said that they were bound to know the rules and constitution of their own company.

Company need not be made a party to the action.

Any shareholder or stranger who suffers from the malversation of directors has a title to sue them, and it is not necessary that the company should be made a party to the action either as pursuer or defender (*a*). Yet where, by the constitution of the company, the evils complained of may be redressed without judicial proceedings, a shareholder will not be allowed to single out individual directors and sue them, before availing himself of the other modes of remedy provided for this purpose (*b*).

Directors not copartners.

But as directors are not in that character partners with each other, they are not liable for each other's malversations or derelictions of duty, unless they can somehow or other be identified therewith, or have been guilty of such supineness or negligence as permitted the others without check to act in the manner complained of (*c*). All, however, who have joined in an act of fraud will be held liable (*d*).

All involved need not be called.

On the other hand, the party aggrieved, whether a stranger or a shareholder, is not bound to call as defenders all the directors who have been guilty of the acts complained of. They are each liable *singuli in solidum*, and if cast in damages must find their relief against their associates as best they may (*e*).

Duties of directors after retirement.

It may here be noticed, that the duties of directors do not always terminate by their renunciation of office. This is especially true of such duties as are incumbent on them as trustees for the company. Thus a director, in whose name as trustee for the company its property had been vested, was held bound after his retirement from office to concur when required in a conveyance of such property, though he was found entitled to have the fact of his being no longer a director mentioned in the deed (*f*).

(*a*) *Tulloch* v. *Davidson*, *Dobbie* v. *Johnstone*, *Inglis* v. *Douglas*, *Cullen* v. *Johnstone*, and *Western Bank* v. *Bairds*, *supra*.

(*b*) *Orr* v. *Glasgow*, *etc.*, *Ra. Co.*, 1857, 20 D. 332, aff. 1860, 3 Macq. 799, and 22 D. (H. of L.) 10.

(*c*) *Inglis* v. *Douglas*, *Cullen* v. *Johnstone*, *Western Bank* v. *Bairds*, *supra*.

(*d*) *Inglis* v. *Douglas*, and other cases, *supra*.

(*e*) *Tulloch* v. *Davidson*, *supra*; *Leslie* v. *Lumsden*, 1851, 14 D. 213; *Western Bank* v. *Douglas*, *etc.*, 1860, 22 D. 447.

(*f*) *Stewart* v. *Gloag*, 1837, 16 S. 86; aff. 1839, M'L. and R. 721.

BOOK III.

RIGHTS AND OBLIGATIONS OF PARTNERS AND COMPANIES.

CHAPTER I.

PRELIMINARY.

Division of rights and obligations.

THE rights and obligations of partners or shareholders, and of firms or public companies, are of two kinds—those *inter socios*, and those with the world. They are likewise distinguishable into two classes with reference to their nature and origin: one class arising out of the very nature of the partnership relation, and being recognised and enforced as such by the common law; the other emanating directly from public authority, destined for some special purpose, and attaching to some particular association.

Principle of rights and obligations *inter socios*.

When men associate themselves into private firms or public companies for the acquisition of mercantile gain, their object is to obtain the largest possible return for their contributions, at the least possible risk of liability or loss. This principle infers the existence of certain rights and corresponding obligations *inter socios*, of which it forms at once the ground and the measure; and if steadily kept in view, it affords a ready means of ascertaining what these rights and obligations are, and in what manner they are to be exercised and enforced. Thus, to share in the management, and to have free access to the books of the company, to call his associates to account for their intromissions, to check their malversation, to terminate the partnership relation, and to apply for judicial aid to

hold good in the case of shareholders; for it might be truly said that they were bound to know the rules and constitution of their own company.

Company need not be made a party to the action.

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(*a*) *Tulloch* v. *Davidson*, *Dobbie* v. *Johnstone*, *Inglis* v. *Douglas*, *Cullen* v. *Johnstone*, and *Western Bank* v. *Bairds*, *supra*.

(*b*) *Orr* v. *Glasgow*, *etc.*, *Ra. Co.*, 1857, 20 D. 332, aff. 1860, 3 Macq. 799, and 22 D. (H. of L.) 10.

(*c*) *Inglis* v. *Douglas*, *Cullen* v. *Johnstone*, *Western Bank* v. *Bairds*, *su…*

(*d*) *ca…*

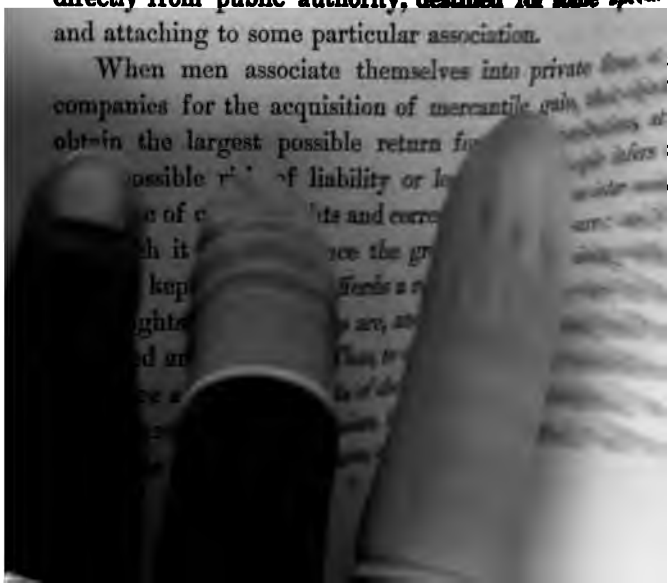
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When men associate themselves into private firms or companies for the acquisition of mercantile gain, with a view to obtain the largest possible return for [illegible] possible risk of liability or loss [illegible]

protect his interests if other measures fail, are rights so necessary to secure a partner in his due share of profits and to protect him against loss or absolute ruin, that it is very plain no partnership which did not confer these rights on its members in some form or other, would ever be entered into by a man of ordinary prudence. But since, on the other hand, the success of the common undertaking, and consequently the profits of each member, depend in a most important degree on the mode in which these rights are exercised, and since they are capable of being abused so as to defeat the very ends they were intended to serve, the same principle points out the mode of their exercise, and requires that they shall be used with discretion, conformably to the nature of the undertaking, in accordance with the provisions of the contract, and in such a way as not to injure or compromise the general welfare.

In corporations.

In unincorporated associations these rights and obligations are regulated by the common law, which is the ordinary form in which the principle above enunciated finds expression; but independently of this, they generally form the subject of special provisions in the company contract, defining the manner in which they are to be exercised conformably with the nature, purpose, and constitution of the association. As we shall afterwards see, they are also sometimes limited both as to extent and mode of exercise; but when this is the case, the Courts will not enforce such limitations on the implied rights of a partner so as to afford a cover for fraud or to defeat the ends of the partnership. In corporations, the rights and obligations of the members are almost always regulated by the charter or special act; but where the incorporating instrument is silent, they fall to be determined in all respects as in unincorporated associations, except in regard to the power of dissolution.

Rights and obligations in relation to the public.

The rights and obligations of companies and their members in relation to the public are determined by the same principles and rules of the common law as regulate the dealings of individuals with each other; but in order to apply these properly, it must be borne in mind, that companies being possessed of a separate person, their rights and obligations are in many respects distinct from those of their members; and that certain rights and obligations attach to partners or shareholders as such, which but for this character they would not possess. No conventional provisions in the instrument

of formation, extending, limiting, or modifying the rights and obligations of unincorporated companies or their members, are of the smallest avail in questions with the world; the publicity necessary to form the basis of a contract to that effect being wanting. To give effect to such provisions, they must be shown to have been known and assented to by the party who is sought to be brought under their operation. The privileges, however, of companies and their members may be extended, and their liabilities restricted in relation to the public, to any extent, by the action of the Legislature, and within certain limits by that of the Crown. Special acts, charters, and registration, are the familiar modes by which these ends are attained. But it must be observed, that as such privileges and exemptions are encroachments on the common law, and consequently on the general rights of the public, they will be strictly construed, and rather against than in favour of the corporation.

Exclusive privileges and aggressive powers.

When a company is vested with special powers or privileges by public authority, certain corresponding obligations are necessarily imposed upon it, either expressly or by implication; for as such powers and privileges are encroachments on the rights of the public at large, they are never conferred except for the purpose of benefiting the public in some special and important manner.

Rights to sue and defend.

In order to make good their rights, and to maintain their interests, partners and companies have the right of appearing judicially, and of suing and defending, not only in questions with the public, but also in matters arising *inter socios*. In this respect the laws of England as applicable to private firms and unincorporated associations are highly defective, and often powerless to attain the ends of justice; but from the recognition of the separate person, difficulties of a similar kind seldom present themselves in this country, though they may occasionally be found. In both countries, the rights and privileges possessed by corporations either at common law or by special statute prevent the occurrence of such anomalies.

Mode of treating the subject.

In proceeding with the examination of the various matters which form the subject of the present book, we shall begin by treating generally of the rights and obligations of partners and shareholders in questions *inter socios*, and in relation to the world; we shall then consider the rights and obligations of companies in reference to their members and to the public; and having thus given a general

view of the subject, we shall proceed to examine more particularly and in detail, such rights and obligations as well as such doctrines as from their importance demand special attention. In conclusion, we shall endeavour to explain the doctrines applicable to exclusive privileges and aggressive powers, and examine the statutory provisions upon this subject furnished by the Consolidation Acts. The rights of companies and their members to sue and be sued, and the legal measures by which their rights and obligations may be enforced, will form the subject-matter of the following book.

CHAPTER II.

GENERAL VIEW OF THE RIGHTS AND OBLIGATIONS OF PARTNERS AND SHAREHOLDERS IN RELATION TO THE COMPANY, TO EACH OTHER, AND TO THE PUBLIC.

Division of subject.

As we have already seen, the rights and obligations of partners or shareholders are twofold, viz. those *inter socios*, and those in a question with the public. We shall proceed to consider them in that order.

I. INTER SOCIOS.

Principle of rights and obligations *inter socios*.

The principle which lies at the root of all such rights and obligations, and which must *in dubio* regulate and define them, is, as we have already stated, the following: that as persons associating for the purpose of mercantile gain have for their object to obtain the largest possible return for their contributions, at the least possible risk of loss or liability, they must be held to possess, in relation to each other, all the rights, and to be subject to all the obligations, which the attainment of that object necessarily implies. The manner in which this principle finds expression in the rules of the common law, in statutory enactments, and in conventional arrangements or usages, will be explained and illustrated in the present chapter, and generally throughout the remainder of the present book.

Right to compel adherence to contract of formation.

One of the most important rights which a partner can possess, and one indeed which in itself may be said to embrace all the others, is that of insisting that the agreed upon conditions and provisions of the contract, whatever these may be, shall be rigidly adhered to and faithfully carried out. It consequently forms a

fundamental principle of partnership law in all its ramifications, that no change can be made in the original contract, whatever its form may have been, against the wishes of a single partner or member. Hence any partner may object to an alteration in the purposes of the undertaking, the nature of the business, the sphere of action within which it is to be carried on, the amount of capital, or the mode of management in essential points, and to any change of membership in private firms (*a*).

Power to alter entrusted to majorities.

Provisions are often contained in the instrument of formation, by which a majority of the members are empowered to make considerable alterations in some or all of the matters referred to; and when this is the case, resolutions to that effect, passed in conformity with the prescribed rules, will bind dissenting minorities. Yet this does not form any exception to the principle above stated; for the entrusting of such powers to majorities forms, in the case supposed, a part of the original contract to which all have assented.

Delectus personæ.

In private partnerships, the success of the company business often depends as much or more on the personal qualities of the individual partners, than on the amount of their pecuniary contributions; and whatever skill or aptitude for business a man may possess, the fact of his being personally disliked by his copartners would effectually prevent that harmonious working together which is an essential condition of success in all combined operations. It is therefore a fundamental principle of the law of private partnerships, that no person can be introduced into the concern against the will of a single member (*b*). Hence heirs and executors have no right, as such, to become partners with the *socii* of a deceased partner (*c*); and death or bankruptcy of partners, and the marriage of a female partner, operate a dissolution in the absence of a stipulation to the contrary; for the effect of such incidents would otherwise be to introduce a new partner without the consent of the others (*d*).

Partners bound to contribute as stipulated.

Every partner must make good his stipulated contribution of

(*a*) *Sclanders* v. *Kennedy*, 1833, 11 S. 279. See also *ante*, pp. 72, 191–4; *Edinburgh and Newhaven Railway Company* v. *Sprott*, 1842, 4 D. 1459; *Orr* v. *Glasgow, Airdrie, etc., Railway Company*, 20 D. 327, aff. 1860, 3 Macq. 799.

(*b*) 2 Bell's Com. 620.

(*c*) *Ibid.*

(*d*) See Dissolution.

money, goods, property, connection, etc.; and every incoming partner, such premium or other consideration as he may have covenanted to pay. Stipulated deposits and calls, made in conformity with the provisions of the contract, form obligations against such as join public companies (*a*). Failure or refusal to fulfil such obligations will ground action against the offending partner at the company's instance, and may afford good reason for dissolution in private copartneries. In public companies, and also in ordinary trading firms, it is often provided that offences of this kind shall warrant the company to exercise the right of expulsion or forfeiture of shares, or to withhold dividends until the obligation is fulfilled (*b*).

Waiver of previous claims inferred from constituting partnership.

The fact of entering into partnership may sometimes amount to a waiver of all previous claims between those who become partners. Such an arrangement may be a mode of contribution; or a discharge of his debt may have been the premium in respect of which the debtor agreed to become a partner with his creditor. When such questions present themselves, they ought to be determined by a jury (*c*).

Sharing in management.

All partners, whether active, latent, or dormant, are entitled to take part in the company management, to have free access to and inspection of the books and accounts, and to receive full information from their copartners on every particular relating to the affairs of the company. Even in public companies these rights can never be eliminated, though they may be subjected to such rules and restrictions as have been assented to by all for the general good. But in the exercise of these rights, shareholders no less than partners are entitled to do nothing which may compromise the interests of the company (*d*).

Bona fides.

In all matters relative to the common interest, partners are bound to conduct themselves towards each other with the utmost fidelity and good faith. They are bound to the company as an agent is to his principal; they must not benefit themselves at the expense of its interests, and they have no right to publish its affairs in a way detrimental to its welfare (*e*).

(*a*) Rights and Obligations of Companies.

(*b*) See p. 153 *et seq.*

(*c*) *Thomson* v. *Campbell's Trustees*, 1831, 5 W. and S. 16; 7 Bligh N. S. 432, as reversing 7 S. 650.

(*d*) See *postea*, 'Right to share in Management,' p. 385.

(*e*) See p. 329 *et seq.*

Improprieties of this kind subject the offending member in damages, and in private firms may perhaps form a good ground for dissolution (*a*). Partners are bound to communicate to the company any profits or advantages which they may have secured by making use of its capital, interest, or connection (*b*).

Accounting.

Partners are entitled to call their fellows to account for their whole intromissions with the company property and assets, and are bound to answer in like manner at the suit of the company. In actions of this kind between the company and its partners, the difficulties and embarrassments which arise in the law of England from the non-recognition of the *quasi* person, are very little felt in Scotland (*c*).

Contribution and indemnity.

Partners are, moreover, entitled to be indemnified for all losses incurred by them on account of the concern, under deduction of the share falling to themselves; they are likewise entitled to be relieved of all obligations which they have undertaken for the company with the consent or approval of their copartners; and to be repaid all advances or loans which they have made to the company over and above their own stipulated amount of contribution (*d*).

Right to interest on advances.

A partner is entitled to interest on advances or loans of money made by him to the firm; for he is entitled to deal with it as with a third party; and it is said that he may demand interest on advances made in *bona fide* for partnership purposes, when this was done without the direct authority, and even without the knowledge, of his fellows (*e*). This would seem, however, to be law only in special circumstances (*f*). It would seem that a partner is entitled to interest on dividends not paid within a reasonable time, unless he has forfeited this claim by *mora* or acquiescence (*g*). This may, however, be otherwise fixed in the contract or incorporating instrument. It is very doubtful whether interest is due *ex lege* on unpaid

(*a*) See *antea*, p. 182 *et seq.*, and *Pender* v. *Henderson and Co.*, 1864, 2 Macph. 1428.

(*b*) Last references, and p. 330.

(*c*) See 'Actions between Partners and the Company.'

(*d*) See 'Contribution and Indemnity,' and Shaw's Bell's Prin. s. 370.

(*e*) See *Denton* v. *Rodie*, 3 Camp. 496; *ex parte Chippendale*, 4 De G. Mac. and G. 36; *ex parte Bignold*, 22 Beav. 143; Collyer, p. 231.

(*f*) See *Stevens* v. *Cook*, 5 E. Jur. N. S. 1415.

(*g*) *Ballandene* v. *Glasgow Union Bank*, 1839, 1 D. 1170.

money contributions until they have been constituted by action. This, however, is often regulated by the company contract (*a*).

Right to profits and dividends.

The right to share profits is so necessary to the very existence of the partnership relation, that, except in very special circumstances, it cannot be forfeited. The same is true of dividends in public companies; and therefore clauses and provisions of forfeiture, which are frequently inserted in the special acts or other instruments of formation (*b*), will be very strictly interpreted.

No right to remuneration for services.

Unless in the case of a special contract, partners are not entitled to any remuneration for services rendered to the company (*c*). This rule, however, does not seem to apply to public companies formed into proper corporations.

Rights of partner to sue for company debts, etc.

The company being a separate person, is alone entitled to demand satisfaction of its debts, rights, and claims. Hence no partner, nor any number of partners, are entitled to sue as individuals for that which is due only to the company (*d*); and hence, though partners are entitled to raise action in the company name, the action will be dismissed if it is found that they are doing so without authority, or to serve their own purposes (*e*). This holds good not only in questions with the public, but in questions between the partners themselves. Thus, one of the two partners of a company was held not entitled in his own name, or in that of the company, to insist in a summary process against his copartner for removing him from a house, into possession of which he had been put as a partner and manager of the company, though the house was vested in the person of the partner pursuing for behoof of the company (*f*). For the same reason, if, pending an action by a company, dissolution takes place, a partner wishing to carry it on must show that he has been authorized to do so by the company (*g*).

When ground of action affects the partner individually.

It must be observed, however, that when the ground of action is something which affects the partner personally as well as the

(*a*) See last case, and 'Calls.'

(*b*) See 'Right to share Profits and Dividends,' p. 376, and p. 154.

(*c*) See p. 414.

(*d*) *Scottish Emigration Society* v. *Borland*, 1855, 18 D. 239.

(*e*) See *Scottish Emigration Society* v. *Borland*, 1855, 18 D. 239; *May* v. *Matthews*, 1834, 13 S. 94; *Scotland* v. *Walkingshaw*, 1830, 9 S. 25; *Balfour* v. *Kerr*, 1856, 18 D. 619; *Shotts Iron Co.* v. *Hopkirk*, 6 S. 399; *Malcolm* v. *West Lothian Ra. Co.*, 1835, 13 S. 887.

(*f*) *Rutherford* v. *Finlayson and Finlayson*, 1828, 7 S. 10.

(*g*) *Gibson* v. *Stewart*, 1822, 1 S. 352.

company of which he is a member, he will be entitled both to sue and defend in his own name, whether the company chooses to appear or not. Thus, when a libel reflects directly on one partner, and through him against the firm, he will be entitled to sue as an individual, without prejudice to an action at the instance of the company; but the conclusions of the first action must be for individual damage; those of the second, for injury to the company (*a*). And it should seem that, though the libel affects a partner more particularly as such, he is still entitled to an action in his own name (*b*); and so also where a random charge is made against a company without specification of individuals (*c*). An action lies by a shareholder against a person who slanders the title to his shares, and thereby causes him damage (*d*).

Partner may sue after dissolution.

After dissolution of a firm by death, the survivor may sue in the company name for its outstanding debts (*e*); and if the executors of the deceased partner are dissatisfied with the fitness of the survivor for this duty, their remedy appears to be to apply to the Court for the appointment of a judicial factor (*f*). But the executors-creditors of a deceased partner have been found to have no right to sue for a debt said to be due the company, though the sole surviving partner was stated to have disclaimed all interest therein (*g*).

Rights of partner retiring without dissolution.

When a partner retires without a dissolution, he is entitled to compel his former partners, who still continue to carry on the concern, to fulfil all the obligations which they undertook to him, as conditions of his retirement; *e.g.* payment of an annuity, and indemnity against liability for former or subsequent company obligations. These claims are not merely good against his former partners, but against any other firm coming in their place (*h*).

(*a*) *Harrison* v. *Bevington*, 8 C. and P. 708; *Haythorne* v. *Lawson*, 3 C. and P. 196; *Forster* v. *Lawson*, 3 Bing. 452; *Solomon* v. *Medex*, 1 Stark. 191.

(*b*) *Harrison* v. *Bevington*, *supra*; *Robinson* v. *Marchant*, 7 Q. B. 918.

(*c*) *Le Fanu* v. *Malcolmson*, 1 House of Lords Cases 637. See *Blaikie* v. *Duncan*, 1857, 19 D. 983; *North of Scotland Banking Co.* v. *Duncan*, 1857, 19 D. 881.

(*d*) *Malachy* v. *Soper*, 3 Bing. N. C. 371.

(*e*) *Boyd's* v. *Fraser's Trs.*, 1822, 1 S. 231; 2 Bell's Com. 638; *Fraser*, 2 K. and J. 496; *Allen*, 4 Madd. 464.

(*f*) See 'Judicial Factor,' and 'Consequences of Dissolution.'

(*g*) *Royer* v. *Jamieson*, 1838, 16 S. 418.

(*h*) *Alexander* v. *Clark*, *etc.*, 1862, 24 D. 323.

Though in general a discharge to the company is a release to the partners, yet this applies only to company obligations; and therefore an agreement between partners to grant 'full and competent discharges to each other, in full of all bonds, etc., as individuals or partners,' was held not to embrace a bond by one partner to another relating to a private transaction between themselves (*a*). Claims between partners as individuals.

It is often of great importance to partners that they should have the power of dissolving the company when they find that it is not working profitably, that a further continuance may involve them in heavy liabilities, or that the realization and division of the property is of importance for their individual interests. Hence, in all partnerships at will, every partner may operate a dissolution when he thinks fit; and in partnerships for a term, there are certain cases in which, for the common good of all, the Court will interfere to wind up the concern (*b*). When, as is frequently the case, the contract of formation provides that a joint-stock company shall be dissolved on the occurrence of certain circumstances, such as loss of a certain amount of capital, any partner is entitled to raise an action of declarator for this purpose, when the contemplated event has taken place (*c*). Right to dissolve.

A partner may lose the power of insisting in his rights by delay amounting to acquiescence, or by doing something which involves ratification of the acts of his copartners. Thus when a contract of copartnery provided that, on balances being struck and subscribed at certain times, they should be 'probative,' it was held in an action between representatives of partners, raised nearly thirty years after the last doquet, that as the subscriptions were admitted, though not adhibited at the times fixed, the balances were obligatory (*d*). But the right of claiming an accounting between partners will not readily be held to have been passed from; so an executor of a deceased partner was held entitled, fifteen years after the company accounts had been adjusted and settled, to prove that a certain heritable bond which had not been included in the accounting had belonged to the copartnery, and to claim a share Loss of rights.

(*a*) *Crawford* v. *M'Cormick*, 1827, 2 W. and S. 569.

(*b*) See Dissolution.

(*c*) *North British Bank* v. *Collins*, 1850, 13 D. 349; aff. 1852, 15 D. (House of Lords) 29, 1 Macq. 369.

(*d*) *Maclaren* or *Law, etc.*, v. *Liddell's Trs.*, 1860, 22 D. 373.

therein (*a*). It is very doubtful whether any other than the long prescription applies to questions of accounting *inter socios* (*b*). A partner may lose his right to share profits by having disclaimed the transaction out of which they arose (*c*). Acquiescence, when clearly established, will prevent partners from availing themselves of the provisions even of a special act. Thus where the partners of a canal company authorized a committee to raise money on the security of the rates, which the committee did, and expended the money on the canal, they were afterwards held barred by acquiescence from insisting that the rates should be applied *primo loco* in extending the canal in terms of their special act (*d*). In one case, where a partner was found liable in interest on unpaid instalments, no interest was allowed him on dividends which he had allowed to lie over without claiming them (*e*). The principle of this decision, apart from the special circumstances, admits however of grave doubts.

Compensation and retention.

Partners may plead compensation in mutual claims between themselves and their companies, and in some cases also in questions with the public. They have also a right of retention or lien on the partnership property, for the purpose of having it applied in payment of the debts of the firm; and also on the free assets, for having them applied in payment of what may be due the partners respectively, after deduction of what is due by them to the firm. Both these subjects will be afterwards fully considered (*f*).

II. IN QUESTIONS WITH THE PUBLIC.

Liability for company obligations.

Partners and shareholders are liable to the public for obligations constituted against the company; and where this liability is not limited by public authority, it extends to their whole means and estate (*g*). But it applies to company obligations only, and has therefore nothing to do with the private debts of the copartners.

Not for debts of copartners.

(*a*) *Lister* v. *Sutor*, 1811, aff. 1815, 6 Pat. App. 78.

(*b*) See *M'Inlay and Co.* v. *M'Inlay and Co.*, 1851, 14 D. 162.

(*c*) *Pollock's Representatives* v. *Buchanan*, 1824, 2 S. 581, and 1825, 4 S. 39; aff. 1826, 2 W. and S. 143.

(*d*) *Houston* v. *Lady Montgomerie*, 1821, 1 S. 179. See also *Dixons* v. *Monkland Canal Co.*, 1830, 8 S. 826; aff. 1831, 5 W. and S. 445.

(*e*) *Ballandene* v. *Glasgow Union Bank*, 1839, 1 D. 1170.

(*f*) P. 415 *et seq.*; p. 424 *et seq.*

(*g*) See *antea*, pp. 286 *et seq.*

Thus, when two parties engaged in a joint adventure for the purchase of real property, the title of which was taken to them jointly as *pro indiviso* proprietors, while the profits and burdens were to be shared equally between them, it was held that one of the partners who had made a *super* advance was preferable on the price of part of the property, which was sold to personal creditors of the other, although they had used inhibition (*a*).

A partnership cannot be entered into so as to escape from private debts.

A person, however, cannot take advantage of this principle so as to escape from liability for debts already contracted, by entering into a partnership with conjunct and confident persons. In such cases the partnership is a mere blind. Thus, in a question with the poinding creditors of a husband, it was held that a contract of copartnery between his daughter, wife, and father-in-law, to carry on the business of a tavern formerly belonging to and carried on by himself, and an assignation by the father-in-law to the partners of an execution of poinding twenty years previously of the partnership effects, did not divest the husband of these effects in a question with creditors (*b*).

Partners liable only for debts attaching to their company.

When an obligation is undertaken by a company jointly with other persons, whether companies or individuals, the company, in a question with its co-obligants, is liable only for its individual *pro rata* share, and hence the liability of the individual partners is limited to that extent. Thus, when a bond for a cash-credit was signed by a company firm and the two individual partners, and also by another party and the principal for whose behoof the credit was granted, it was held, in a question of relief, that there were only two cautioners, and that the individual partners and the company were not liable each in a separate share, but together only in one share (*c*).

Partners are bound to deal honourably with the public.

In their dealings with the world, partners must conduct themselves with truthfulness and fairness. They must not represent the state of the concern as other than it really is, so as to induce strangers to become members (*d*), or to transact with it under

(*a*) *Keith* v. *Penn*, 1840, 2 D. 633. See also *Lockhart* v. *Ferrier*, 1842, 4 D. 1253; *Pearson, Wilson, and Co.* v. *Brock*, 1842, 4 D. 1509; *Lusk* v. *Elder*, 1843, 5 D. 1279.

(*b*) *Breichan* v. *Muirhead*, 1810, Hume 215.

(*c*) *Christie* v. *Reid*, 1826, 4 S. 372; and see *Erskine* v. *Cormack*, 1842, 4 D. 1478.

(*d*) *Dobell* v. *Stevens*, 3 B. and C. 623; *Gerhard* v. *Bates*, 2 E. and B. 476; *Denton* v. *Great Nor. Ra. Co.*, 5

erroneous notions of its credit or prospects (*a*); neither must they represent their agency as more extensive than it really is, so as to lead the public to enter into transactions with them which are not binding on the firm, or which it will not ratify or adopt (*b*). Such proceedings render them justly liable in reparation and damages. What partners undertake to do, they must to the best of their ability perform; and therefore, if they assign their shares to third parties, neither they nor others in their right can treat the assignation as a nullity, because some of the conditions of transfer which might have been required in a question with the company have not been complied with (*c*). On the other hand, if persons hold themselves out as being partners, by statements, by acts, or even in some instances by significant silence, and thereby lead the public to contract with the company on the faith of their credit, they become liable for its obligations, whether they be actually partners or not (*d*).

E. and B. 860; *Watson* v. *Charlemont*, 12 Q. B. 856. See *antea*, pp. 256 and 332.

(*a*) See p. 334.

(*b*) See p. 331.

(*c*) See *Hill* v. *Lindsay*, 1847, 10 D. 78; *Macandrew* v. *Robertson*, 1828, 6 S. 950; *Drummond* v. *Hunter*, 1834, 12 S. 620. See *antea*, pp. 142-3.

(*d*) See pp. 57, 52-3-4.

CHAPTER III.

RIGHTS AND OBLIGATIONS OF COMPANIES.

General observations.

ACCORDING to the laws both of Scotland and England, corporations are artificial but proper persons, and may therefore hold rights and contract obligations in relation not only to the public, but to their own members, irrespective of the units of which for the time being they may be composed. According to the law of Scotland, unincorporated associations formed for the purpose of gain, such as partnerships and firms, are also to certain effects distinguishable from their members, and are therefore said to be possessed of a *quasi* person, which is capable, though in a much more limited sense than the proper person of a corporation, of acquiring rights and incurring obligations. In England, those rights and obligations are said to be the joint and several rights and obligations of the partners. Practically, the English theory produces in the general case a mere peculiarity in the language employed; and as regards this branch of the subject, will often be found a useful mode of testing the real state of questions *inter socios*, even in Scottish law. But there are some respects in which it produces legal rules essentially at variance with the Scottish system, and indeed with common justice. This is particularly the case in legal proceedings (*a*).

RIGHTS AND OBLIGATIONS IN RELATION TO FORMATION.

Enforcement of an agreement to enter into partnership is generally incompetent.

When two or more persons have agreed to enter into partnership, or where a firm already existing has agreed to receive a stranger as a new partner, an action *ad factum præstandum* would not lie in Scotland, nor, unless in some exceptional cases, would a

(*a*) See ' Actions between Partners and the Company.'

suit for specific performance be competent in England (*a*). The reason of this is, that as partnership is a contract of exuberant trust, and can only be carried on successfully when the partners give their best and united exertions for the furtherance of the common good, nothing but disastrous results could be looked for from compelling persons to become partners against their will, however groundless or fanciful their objections might be. Besides, in many cases an enforced partnership would be practically a nullity: if the agreement had been for a partnership at will, it would be dissolved by the recalcitrant partner as soon as formed; and even where it was for a term, he would generally have it in his power to make his copartners only too glad to be free of the connection. The remedy, therefore, in all cases of this kind is by action of damages, in which the jury will award such reparation for breach of agreement as, in the whole circumstances, appear to meet the equity of the case.

Exceptions.

Some exceptions, however, appear to exist to this doctrine. The chief of these appears to be where parties have become bound to enter into a partnership, the effect of which, when formed, would be to produce important legal consequences to themselves or third parties, and without which these consequences could not be made to emerge (*b*).

Declaratory procedure generally meets such cases.

There is a class of cases where the existence of the partnership relation is a necessary preliminary to the enjoyment of certain rights or emoluments by one or more of the partners. Thus, where profits have been realized on a joint adventure, or on an established business, and a party claims his share in the one, or seeks to be found entitled to participate in the management and emoluments of the other, it is plain that the establishment of the partnership relation must generally form a condition precedent to such claims. In England, where the action of declarator is unknown, such cases, if they do not resolve into mere claims of damage, are made the subject of suits in Chancery, in which specific performance of an agreement to enter into a contract of copartnery is decreed,

(*a*) *Downs* v. *Collins*, 6 Ha. 418; *Hervey* v. *Birch*, 9 Ves. 357; *Maxwell* v. *the Port-Tenant Co.*, 24 Beav. 495; *Sheffield Gas Co.* v. *Harrison*, 17 Beav. 294; *Stocker* v. *Wedderburn*, 3 K. and J. 393.

(*b*) *Hill* v. *Wylie*, 1865, 3 Macp. 541. See *Warner* v. *Cunninghame*, 1798, M. 14603; and Lindley 796.

so as to form the basis for the after settlement of the respective rights of parties (*a*). In Scotland, the remedy in such cases is generally by action of declarator, in which the nature of the partnership is ascertained; and this may be coupled with conclusions of count and reckoning, of damages, or of interdict, as the circumstances of the case may require.

Case of larger associations.

In the case of companies, whether corporations or not, in which the only contribution is money or credit, and where the element of *delectus personæ* has consequently no existence, there does not appear to be the same objection to enforce the giving or accepting of shares when an agreement to either effect has been established. Cases have often occurred in England, where a court of equity has decreed specific performance of a contract for the purchase and sale of shares (*b*). Since the Common Law Procedure Act of 1854 authorized the issue of mandamus to enforce implement of any duty in the performance of which the applicant is interested, this writ has been used to compel a chartered company to register as a shareholder a person entitled to be so registered (*c*). In Scotland the same objects would be accomplished by an action of declarator, with conclusions *ad factum præstandum*, perhaps in some cases by summary petition to the Court (*d*).

Company not yet formed.

But while the Courts will thus enforce an agreement to receive a shareholder in a company already formed, it would rather seem that they will not interfere to compel implement of a contract for the allotment and acceptance of shares or scrip in a company yet to be formed (*e*). The reason of this distinction is obvious. If a public company has been once formed and in operation, the addition of some members whose only contribution is money will make little if any practical difference; whereas when the company is yet to be

(*a*) *England* v. *Curling*, 8 Beav. 129; *Webster* v. *Bray*, 7 Hare 159; *Robinson* v. *Anderson*, 20 Beav. 98; *Dale* v. *Hamilton*, 5 Hare 369.

(*b*) *Shaw* v. *Fisher*, 2 De G. and S. 11; *Wynne* v. *Price*, 3 De G. and S. 310; *Duncuft* v. *Albrecht*, 12 Sim. 189; *Wilson* v. *Keating*, 5 E. Jur. N. S. 815, M. R.; *Cheale* v. *Kenward*, 3 De G. and J. 27.

(*c*) *Norris* v. *Irish Land Co.*, 8 E. and B. 512.

(*d*) See *Brown* v. *Syme*, 1834, 12 S. 536.

(*e*) See *Bluck* v. *Mallalue*, 27 Beav. 398; *Columbine* v. *Chichester*, 2 Ph. 27; *Sheffield Gas Co.* v. *Harrison*, 17 Beav. 294; *New Brunswick and Canada Ra. Co.* v. *Muggeridge*, 1 Dr. and Sm. 363; *Oriental Steam Nav. Co.* v. *Briggs*, 8 E. Jur. N. S. 201.

repetition, however early it may be brought to a close (*a*). Yet this does not apply to cases of fraud; and where a person has taken another into partnership, he cannot, as soon as he has received the premium, dissolve the concern and retain the money (*b*).

Deposits.

If a number of persons make deposits in the hands of a committee for the purpose of carrying out a proposed undertaking, such as the formation of a joint-stock company, some of their number cannot withdraw their deposits against the will of the others, until the undertaking in which they were all concerned has either been abandoned or become plainly impracticable (*c*); and even then they are only entitled to the balance which remains on their deposits, after deduction of the expenses or outlay already incurred in efforts to form the company (*d*).

In what circumstances they must be returned.

But if the deposits were made for the purpose of forming a company for certain objects and upon certain conditions, and no such company is formed, the subscribers will be entitled to recover the full amount of their deposits (*e*). In questions of this kind it is obviously a matter of primary importance to ascertain what were the exact terms of the agreement, and for what specific purposes the deposits were made. For if it appear that a company not differing in essentials from that proposed, or exhibiting greater variance than was within the discretionary powers entrusted to the promoters, has been *de facto* formed, a subscriber has no right to recover his deposit. And again, if expenses have been incurred in endeavouring to establish a company not differing from that proposed except in the degree mentioned, the depositors can only recover what balance remains (*f*). Hence the contract must be specifically libelled, and the documentary evidence by which it is established and defined must be before the Court (*g*).

(*a*) See *Akhurst* v. *Jackson*, 1 Swanst. 85.

(*b*) *Featherstonhaugh* v. *Turner*, 25 Beav. 382.

(*c*) *Baird* v. *Ross*, 1855, 2 Macq. 61, reversing judgment of Court of Session. See *Forth Marine Insur. Co.*, reported in H. of L. as *Burness* v. *Pennel*, 6 Bell's App. 541, and 2 H. of L. Cases 497 (1849).

(*d*) *Garwood* v. *Ede*, 1 Ex. 264; *Baird* v. *Ross*, *supra*; *Jones* v. *Harrison*, 2 Ex. 52; *Aldham* v. *Brown*, 7 E. and B. 164.

(*e*) *Nockels* v. *Crosby*, 3 B. and C. 814; *Walstab* v. *Spottiswoode*, 15 M. and W. 501; *Ward* v. *Londesborough*, 12 C. B. 252; *Coupland*, 2 Ex. 682.

(*f*) *Antea*, p. 72.

(*g*) *Vollans* v. *Fletcher*, 1 Ex. 20; *Steadman* v. *Arden*, 15 M. and W. 587; *Clarke* v. *Chaplin*, 1 Ex. 26.

When payment of deposits cannot be enforced.

For the same reasons as those above stated, an agreement to pay deposits on shares cannot be enforced when the scheme has proved abortive, unless where expenses for which the stipulated deposits were liable have been *bona fide* incurred (*a*); and where the company has not started by the stipulated time, a person who has agreed to pay deposits will not thereby necessarily escape liability, for the failure may be in part owing to his own delay to implement his agreement (*b*).

Erroneous payments.

Where a member of a corporation has made a payment to it which was illegal in the office-bearers to exact, the mere fact of his having sanctioned its exaction from others, while in ignorance of its illegality, will not bar his right to have it returned when the impropriety is discovered (*c*).

RIGHT TO DISPOSE OF COMPANY PROPERTY.

Power of companies to dispose of the company property.

Unincorporated companies may dispose of their property in any way they see fit, so long as this is not objected to by a member founding on some prohibition contained in their contract of formation. The case is different with corporations. These associations cannot alienate property which they hold in virtue of their incorporating instrument, and the possession of which is absolutely necessary for the ends and purposes for which they have been incorporated. Thus it is *ultra vires* of a burgh to sell the patronage of a church forming part of the common good of the corporation (*d*). It would be in like manner incompetent for a railway company to sell the undertaking, or part of the lands which they have obtained under their aggressive powers, and which are necessary for the purposes of their traffic (*e*). For the same reason it was held incompetent for a creditor of the governor of the York Buildings Company to retain the seal and charter of the company in security of debts due by the company to him (*f*).

(*a*) *Duke* v. *Andrews*, 2 Ex. 290.
(*b*) *Duke* v. *Forbes*, 1 Ex. 356; *Aldham* v. *Brown*, 7 E. and B. 164.
(*c*) *Porteous* v. *Cordiners of Glasgow*, 1830, 8 S. 908.
(*d*) *Wallace* v. *Magistrates of St Andrews*, 1824, 2 S. 629.
(*e*) *Dundee Union Bank* v. *Dundee and Newtyle Ra. Co.*, 1844, 6 D. 521.
(*f*) *York Buildings Co.* v. *Robertson*, 1805, Mor. No. 2, Hypothec, 13 F. C. 492.

RIGHTS AND OBLIGATIONS IN SURETYSHIP AND GUARANTEE.

Guarantee and suretyship.

The rights and obligations of companies in relation to guarantees and cautionary obligations are radically the same with those attaching to ordinary individuals. In some respects, however, distinctions and peculiarities exist which must here be noticed.

When an individual trades as a company.

Where an individual trades under the name of a firm of which he is the sole partner, guarantees and cautionary obligations granted by him in the company name bind him individually (*a*). *E converso*, if a guarantee be given for furnishings to be made to the fictitious firm, it will cover furnishings made to the sole partner. Thus, where J. W. carried on business under the firm of J. W. and Co., of which he was the sole partner, it was held that a guarantee for furnishings to J. W. and Co. covered furnishings to J. W. (*b*). And it has even been decided that the cautioner in a cash credit for all bills on which the name of C. F. appeared was liable for bills accepted by him under the firm of C. F. and Co., of which he was the sole partner (*c*). The soundness of this decision has, however, been doubted (*d*).

Where parties are really distinct.

If the parties are really distinct, the obligation will only apply to the one by whom or for whom it was granted. Thus, where a party granted a letter of guarantee addressed to Watson and Co., which the principal obligant delivered to Watson, M'Knight, and Co., who made furnishings to him on the faith of it, it was held that although a firm of Watson and Co. had existed and been dissolved only a few days before the date of the letter, and this dissolution was not known to the party, yet that the firm Watson, M'Knight, and Co. had no action against him on the letter, though consisting of the same partners as Watson and Co. with the addition of M'Knight, and carrying on the same business and in the same premises as had been done by Watson and Co. (*e*). Where a person carries on business in his own name, but *de facto* in partnership with others, a cautioner for him in the line of trade prosecuted by

(*a*) See p. 238.

(*b*) *Rose* v. *Moore and Son*, 1833, 11 S. 344.

(*c*) *Booth* v. *Commercial Bank*, 1823, 2 S. 273.

(*d*) More's Stair 107.

(*e*) *Bowie* v. *Watson, M'Knight, and Co.*, 1840, 2 D. 1061.

the company is entitled to relief against the company, and all those composing it (*a*).

Former state of the law.

Formerly the granter of a guarantee or cautionary obligation to or for a company continued bound though a change took place in the membership, at least where the identity of the concern remained unaffected. This was a consequence of the Scottish principle of the *quasi* person of the firm (*b*). And where the price of goods bought by a company was guaranteed, and during their delivery, which extended over a fortnight, the company was dissolved, the granter of the guarantee was found liable for the whole price, though the dissolution had appeared in the *Gazette*, and might have been seen by the sellers before the delivery was completed, no special notice having been sent them (*c*).

Alteration by Mercantile Law Amendment Act.

But now, by sec. 7 of the Mercantile Law (Scotland) Amendment Act (*d*), it is provided, that 'no guarantee, security, cautionary obligation, representation, or assurance granted or made after the passing of this Act, to or for a company or firm consisting of two or more persons, or to or for a single person trading under the name of a firm, shall be binding on the granter or maker of the same, in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the partners of the company or firm to which the same has been granted or made, or of the company or firm for which the same has been granted or made, unless the intention of the parties that such guarantee, security, cautionary obligation, representation, or assurance shall continue to be binding, notwithstanding such change, shall appear, either by express stipulation or by necessary implication, from the nature of the firm or otherwise.'

Observations on.

The statutory provision would not, however, it is thought, apply to a case such as the following. A bond was granted to a bank by a company and two cautioners, binding themselves to make payment of whatever sums 'I the said Archibald Paterson shall draw out,' etc. The company was dissolved after granting the cautionary obligation, and Paterson turned out to have been one of its

(*a*) *M'Leod* v. *Howden*, 1839, 1 D. 1121.

(*b*) *Elton, Hammond, and Co.* v. *Neilson*, 1812, 16 F. C. 699; *Speirs* v. *Royal Bank*, 1822, 1 S. 478; *Aytoun* v. *Dundee Bank*, 1844, 6 D. 1409.

(*c*) *Douglas* v. *Gordon and Co.*, 1814, 18 F. C. 127.

(*d*) 19 and 20 Vict. c. 60, 1856. See p. 277.

partners; yet it was held that the cautioners were liable for all the sums drawn by him subsequent to the dissolution (*a*).

It must also be observed, that the statute only applies to cases where the bond or obligation has been executed subsequent to the passing of the Act (*b*).

Caution for indemnity to retiring partner.

A cautioner became bound to relieve a partner, on retiring from a company, of all claims against him 'as a partner of M. B. and Co., preceding the said first day of October, or in any manner of way, as a partner of the foresaid concern.' The partner did not retire publicly till the 24th of October; and he having been found liable for the price of goods contracted for, but not delivered to the company till after that date, it was held that the cautioner was bound to relieve him (*c*).

When company is granter of the obligation.

When the company are granters of the cautionary obligation, the death of one of the partners does not release the surviving partner although notified in the *Gazette*. Special notification in such a case is necessary (*d*).

Release by conduct of creditor.

Cautioners are frequently liberated from their obligations by the conduct of the creditor. See, as to the application of this principle to obligations in which companies are concerned, the undernoted cases (*e*).

A person gave a letter of credit in favour of a company, which was neither dated nor addressed by him, binding himself to guarantee 'the regular payment at the ordinary periods of credit, of whatever purchases they may make from you within twelve months from this date;' and a partner of the company filled up the date, and addressed and delivered it to a merchant who furnished goods on the conditions stipulated. It was held that the obligation was binding, and that notification of the furnishings was unnecessary (*f*).

Consequences of the company being a separate person.

As the company is a separate person, it follows that when it grants a cautionary obligation along with others, the partners in a question of relief with the other cautioners are only liable for a single

(*a*) *Paterson* v. *Calder*, 1808, 14 F. C. 235.

(*b*) *Church of England Life and Fire Assurance Co.* v. *Wink and Others*, 1857, 19 D. 1079.

(*c*) *Walker* v. *Davidson*, 1821, 1 S. 21.

(*d*) *Kemp* v. *Allan*, 1824, 3 S. 104.

(*e*) *Leith Bank* v. *Bell*, 1830, 8 S. 721, aff. 1831, 5 W. and S. 703; *Clerk* v. *Russell*, 1825, 3 S. 374; *Ellice and Co.* v. *Finlayson*, 1832, 10 S. 345.

(*f*) *Ewing* v. *Wright*, 1808, 14 F. C. 172.

share, viz. that undertaken by the company. Thus, where A., B., and C. signed a bond for a cash credit, A. being a company signing by the company firm and the two individual partners, B. being a co-cautioner, and C. being the principal obligant, it was held in an action of relief that there were only two cautioners, and that the individual partners and the company were not liable each in a separate share, but together only in one share (*a*). This also appears from the case of *Child* v. *Ferguson's Trustees* (*b*). Here A., having obtained a cash credit from a bank on a joint and several bond by himself and others, entered into partnership with B. at a time when the credit was exhausted. Shortly after, the debt due to the bank was paid up by the new company on an assignation to the bond. The company having been dissolved by the death of A., who died largely in its debt, it was held that B., as surviving partner, was entitled, in virtue of the assignation to the bond in the company's favour, to recover from a co-obligant the full amount.

Extent of obligation.

With reference to what transactions are covered by bonds of caution, and guarantees granted to, for, or by companies, reference may be made to the cases noted below (*c*).

CONTRACTS OF SERVICE.

Rights of companies in questions of service.

Not lost by change of membership.

Contracts of service made with companies, or even with private firms, generally hold good notwithstanding a change in the membership, provided that the identity of the concern is not changed in so far as concerns the nature of the business and the mode in which it is carried on. Thus, the manager of a manufacturing business was found not entitled to leave his service merely on the ground that his employer had assumed his sons as partners (*d*). And where a party was bound apprentice to a company and the subsisting members thereof carrying on the business, and on its dissolution his

(*a*) *Christie* v. *Reid*, 1826, 4 S. 372.

(*b*) *Child* v. *Ferguson's Trs.*, 1835, 13 S. 768.

(*c*) *Dykes* v. *Watson*, 1825, 4 S. 70; *Hunter and Co.* v. *Spens*, 1826, 1 Bell 374, n. 3; *Alexander* v. *Scott*, 1827, 6 S. 150; *Forbes and Co.* v. *Dundas*, 1830, 8 S. 865; *Bain* v. *Balfour and Co.*, 1838, 16 S. 1097; *Edin. Water Co.* v. *Bell*, 1838, 1 D. 21; *Swan* v. *Bank of Scotland*, 1839, 2 D. 78; *Thomson* v. *Bank of Scotland*, 1822, 1 S. 257, revd. 1824, 2 Sh. App. 316.

(*d*) *Harkins* v. *Smith*, 1841, 16 F. C. 938, 13 Jur. 281.

services were transferred to a new company formed by some of the former partners, and following out the old business, it was held that he was bound to serve the new company (*a*).

Powers of dismissal.

Where a servant or managing official holds his office on condition that he may be removed by a given majority of the company, or of the committee of management, he may be dismissed by a resolution of the specified majority; and they are not bound to show cause for having done so, or liable in damages if they refuse to assign a sufficient reason (*b*). And where the directors of a bank dismissed their manager, who was engaged during pleasure, they were held not bound to justify their dismissal, and an issue on that point was refused (*c*). Where an agent is employed by a company and paid by a commission on the profits, he is not presumed to be engaged from year to year like a servant; and the company are entitled to discontinue their trade without any previous notice to him, or any compensation for the loss of his situation (*d*). Where a railway guard, who held his situation at the pleasure of the company, and might be dismissed without reason assigned on receiving a fortnight's wages or a fortnight's warning, was dismissed on a charge made against him by an officer of the railway, which he alleged was unfounded, it was held that he had no claim of damages against the company (*e*). But a company improperly dismissing a servant is liable in damages (*f*). Where a workman holding himself out as bound with an English company for a term of years, entered into an agreement in England with a Scotch company, to exchange with another workman in their employment, and entered on service accordingly, he was held not entitled to plead the rule of the Scotch law, that a verbal contract of service is binding for one year only (*g*).

Powers of managers and other company servants.

When the power of a company's manager is fixed by contract, no general evidence to show the practice as to the nomination of

(*a*) *Young* v. *Brown and Co.*, 1785; aff. 1785, 3 Paton's App. 42.

(*b*) *Commercial Bank* v. *Pollock's Trs.*, 1822, 1 S. 428; aff. 1829, 3 W. and S. 430.

(*c*) *Mitchell* v. *Smith*, 1836, 14 S. 358, 11 F. C. 292.

(*d*) *London, Leith, and Glasgow Ship. Co.* v. *Ferguson*, 1850, 13 D. 51. See also, as to powers and circumstances of dismissal, *Ivison* v. *Edinburgh Silk Yarn Company*, 1846, 9 D. 1039; *Tulk, Ley, and Co.* v. *Anderson*, 1843, 5 D. 1096.

(*e*) *Fosdick* v. *North British Ra. Co.*, 1850, 13 D. 281.

(*f*) *Batchelor* v. *M'Gilvray*, 1831, 9 S. 549.

(*g*) *Dale* v. *Dumbarton Glasswork Co.*, 1829, 7 S. 369.

inferior servants by him is competent (*a*). And though the captain of a ship may be entitled to institute legal proceedings against a seaman for desertion in an inferior court, this does not entitle him to continue appearance if the case is taken by the seaman to a superior court, so as to render the company by whom he is employed liable for such further litigation. To entitle him to relief against the company, it is necessary that he shall have intimated the state of matters to them, and have received authority to proceed (*b*). See, as to general and implied powers of agents and managers for companies, the cases noted below (*c*). A bank having appointed one of its partners to be agent in exchanging its notes with those of another bank, and the agent having assented to a new arrangement, under which he opened an account with the other bank, and drew upon it for the amount of notes of his own bank which came into its hands, it was held that he did not in this way bind his own bank for the amount overdrawn in such account, but that another partner of his own bank to whom he communicated the arrangement might be bound (*d*). Companies are liable to the public and to their employers for acts of commission or omission on the part of their servants done in obedience to orders, or in the course of their employment, provided in the last case that they are not delicts, and relate to what the company was by express or implied contract bound to have seen done in a safe and proper manner (*e*).

(*a*) *Gye and Co.* v. *Hallam*, 1832, 10 S. 512 and 710. See also 1 S. and M'L. 747, 14 S. 199, 15 S. 950.

(*b*) *M'Naughton* v. *Allhusen and Co.*, 1847, 10 D. 236.

(*c*) *South Metropolitan Gas Co.* v. *M. of Lothian*, 1838, M'F. 13; *Oliver* v. *Grieve*, 1792, Hume 319; *Inches* v. *Elder*, 1793, *ibid.* 322; *Dewar* v. *Nairne*, 1804, Hume 340; *Nat. Ex. Co.* v. *Drew and Dick*, 1860, 23 D. 1; *Cullen* v. *Thomson and Kerr*, 1862, 24 D. (H. of L.) 10.

(*d*) *Moncrieff* v. *Dunlop*, 1797, 3 Paton's App. 595.

(*e*) *Brown* v. *M'Gregor*, 1813, 17 F. C. 232; *Hill* v. *Merricks*, 1813, Hume 397; *Fraser* v. *Dunlop*, 1822, 1 S. 243; *Anderson* v. *Brownlee*, 1822, 1 S. 442; *M'Laren* v. *Rae*, 1827, 4 Mur. 381, 384, and 388; *Hunter* v. *Edin. and Glas. Union Can. Co.*, 1836, 14 S. 717; *Baird* v. *Graham*, 1852, 14 D. 615; *Advocate-General* v. *Grants*, 1853, 15 D. 980; *Little* v. *Nelson*, 1855, 17 D. 310; *Faulds* v. *Townsend*, 1861, 23 D. 437; *Campbell* v. *Caledonian Ra. Co.*, 1852, 24 Jur. 155. Cases of non-liability, by comparing which with the foregoing, the principle of law will appear: *Linwood* v. *Hawthorne*, 1817, 19 F. C. 327, aff. 1 S. App. 20; *Waldie* v. *Duke of Roxburgh*, 1822, 1 S. 344, aff. 1825, 1 W. and S. 1; *Howey and Co.* v. *Lovell*, 1826, 4 S. 759; *Miller* v. *Harvie*, 1827, 4 Mur. 385; *Lumsden* v. *Russell*, 1856, 18 D. 468; *Shiels* v. *Edin. and Glas. Ra. Co.*, 1856, 18 D. 1199. See also p. 252 *et seq.*, and 262 *et seq.*

Companies are not liable for injuries caused to their workmen by the conduct of their collaborateurs (*a*).

Companies bound to relieve agents.

Companies are, like individuals, bound to relieve their agents of liabilities, and to indemnify them for outlay or loss incurred on their account. Thus, where a company employed agents to freight vessels, who accordingly did so in their own name, and the company failed to implement the charter-party, it was held bound to relieve the agents from damages awarded against them for non-implement (*b*). And where a society sanctioned and adopted the proceedings of an agent conducting a defence in name of the office-bearers for their behoof, and decree went against them with expenses, the members of the society were found jointly and severally liable for the expenses (*c*).

HOLDING PROPERTY, AND CORRESPONDING RIGHTS AND OBLIGATIONS.

The rights of companies and firms to hold real and personal property have already been considered in former parts of this treatise.

Leasehold property.

It may here be remarked that leasehold property should always be taken to corporations in the corporate name. There being no casualties depending on the life of an individual, the intervention of trustees is unnecessary, and may create complications of title. As illustrations of the rights of companies, both as landlords and tenants of leasehold property, reference may be made to the cases undernoted (*d*).

Rights and obligations as tenants.

Where a farm was let to two tenants and the survivor of them, they divided the tenement between them. One of them then

(*a*) *Lennan* v. *Miller and Addie*, as reversed 1859, 21 D. 1382; *Bartonshill Coal Co.* v. *Reid*, and *Ibid.* v. *M'Guire*, as reversed 1858, 3 Macq. 266, and 20 D. (H. of L.) 13.

(*b*) *M'Braire* v. *Hamilton*, 1825, 4 S. 25.

(*c*) *Ramsay* v. *Smaill*, 1840, 2 D. 1336.

(*d*) *Swan's Trs.* v. *Muirkirk Iron Co.*, 1850, 12 D. 622; *Hurlet and Campsie Alum Co.* v. *Earl of Glasgow*, 1850, 12 D. 704, aff. 1850, 7 Bell 100; *Montgomerie* v. *Carrick and Napier*, 1848, 10 D. 1387; *Stewart* v. *Countess of Moray*, 1772, M. 4392, 2 Pat. App. 317; *Keir and Others* v. *Duke of Athole*, 1815, 6 Pat. App. 130; *Leck* v. *Fulton*, 1855, 17 D. 408; *Begbie and Co.* v. *Frame*, 1857, 20 D. 81; *Stewart* v. *Bell*, 1788, 3 Pat. App. 158; *Bald* v. *Alloa Coll. Co.*, 1854, 16 D. 870; *Sinclair* v. *Mossend Iron Co.*, 1854, 17 D. 258; *Croker* v. *Stevenston Coll. Co.*, 1856, 18 D. 496.

assigned his right under the lease to a nephew who, on the death of the cedent, continued in possession for a year, and paid his share of the rent. His name was also entered in the landlord's books as joint tenant. It was held, however, that the assignation and his apparent acquiescence could not bar the other tenant from vindicating his rights under the lease to be received as sole tenant (*a*).

Tenant assuming partner.

A tenant under missives of lease, excluding sub-tenants, assignees, and creditors, having, after becoming bankrupt, assumed a partner, was held, reversing the judgment of the Court of Session, to have such a title of possession as rendered the summary removal of the partners incompetent; nor was the fact that the trustee for the tenant's creditors joined with the landlord in the application for removal, found to affect the question (*b*).

Where one railway company was found in 1856 to have been due rent to another for a lease from 1852, but the amount of the rent was not ascertained till 1856, it was held that interest was not due on each term's rent from the term when it fell due (*c*).

Under a statutory agreement to lease a railway and its branches, on their completion, or on the completion of any part of them, the lease commences on the completion of any part of the main line, though it should be averred that the remainder cannot be completed (*d*).

RIGHTS AND OBLIGATIONS UNDER CONTRACTS.

Rights and obligations of companies under agreements.

The modes in which companies enter into agreements or contracts with the public have already been noticed at pages 197 and 241. It may here be remarked, that if a company hold out an individual as a partner who *de facto* is not, they will be liable to the public for the consequences of his implied agency to the same extent and effect as if he were a partner (*e*).

Whether payments are made on behalf of

It is sometimes a matter of difficulty to determine whether money paid or advanced for behoof of the company had been

(*a*) *Robertson* v. *Menzies*, 1857, 19 D. 667.

(*b*) *Borrows and Co.* v. *Colquhoun*, 1854, 17 D. (H. of L.) 31, 1 Macq. 691.

(*c*) *Stirling and Dunferm. Ra. Co.* v. *Edin. and Glas. Ra. Co.*, 1857, 19 D. 598.

(*d*) *Edin. and Glas. Ra. Co.* v. *Stirling and Dunferm. Ra. Co.*, 1853, 2 Stu. (H. of L.) 1853.

(*e*) *Moyes* v. *Cook*, 1829, 7 S. 793.

the company or of a partner.

so paid or advanced by a partner. See cases of this under-noted (*a*).

Not bound by acts of promoters.

It has already been seen that companies, after formation, whether that takes place by contract or by incorporation, are not bound by the acts of their promoters, unless they are estopped from stating this plea by something done by them after formation, amounting to adoption, recognition, ratification, etc. (*b*).

Trustees.

It is the general rule of law, that a trustee, a factor *loco tutoris*, or a *curator bonis*, is not entitled to charge for business done by him for the trust of a professional kind, because it is justly thought he might, in the absence of such a rule, be tempted unnecessarily to multiply legal or other professional expenses (*c*). Where therefore a trustee employs a firm of which he is a partner to perform work of this kind for the trust, it seems now to be fully established that the firm, like its partner, can make no charge except for outlays (*d*). This, of course, may be altered or modified to any extent by the terms of the trust deed or other instrument of appointment (*e*).

COMPETITION OF RIGHTS.

Questions in competition.

In questions of competition in relation to rights or property, the rules applicable between individuals are generally applied where companies are concerned. Peculiarities arising out of the partnership relation do, however, occur in cases such as the following.

Latent trusts.

An assignation of a share in a company, duly intimated, is not defeated by the cedent having held the share only in latent trust, the rules of the company not allowing such trust to appear in the books (*f*); and an intimated assignation of bank stock in security of a debt previously contracted, is preferable to the right of a party

(*a*) *Kenny* v. *Walker*, 1836, 14 S. 803; *Low* v. *Lizars*, 1838, 16 S. 1093. See *M'Leod* v. *Tosh*, 1836, 14 S. 1058; *Wilson* v. *Laidlaw*, 1816, 6 Pat. App. 222.

(*b*) See *Wishaw and Coltness Railway Company* v. *Stewart's Representatives*, 1837, 15 S. 703; and *antea*, pp. 83–5.

(*c*) Lewin on Trusts, 216 *et seq.*

(*d*) *Lord Gray and Others*, 1856, 19 D. 1; *Mackenzie*, *ibid.*

(*e*) *Goodsir* v. *Carruthers*, 1858, 20 D. 1141; *Burge* v. *Burton*, 2 Hare 373; *Cradock* v. *Piper*, 1 M'N. and G. 664; *Broughton* v. *Broughton*, 2 Sm. and Gif. 422; M'Laren i. 219, ii. 66.

(*f*) *Redfearn* v. *Somerville*, 1805, 13 F. C. 508, as reversed 1813, 1 Dow 50, 17 F. C. 681.

founding on a latent trust (*a*). It may be here observed, that the tendency of the Scottish courts appears always to have been to recognise trusts in matters of partnership, while that of the appellate jurisdiction, as well as of the English courts, has been to ignore such latent equities in all commercial associations. The Scottish tribunals have no doubt been inclined to adopt the course alluded to from a laudable desire to arrive at the equity of the individual case; but there can be little doubt that the recognition of trusts in mercantile companies is opposed to the nature of commercial transactions, is often unfair to copartners and their creditors, and presents great facilities for abuse (*b*). Where trusts appear *ex facie* of the register of even incorporated associations, they appear to have no other effect than that of fixing the right of the beneficiaries in a question with the trustee or those in his right (*c*).

Competition between the company and creditors of partners.

A decree was obtained in an action against an English company, and the individual partners, for a company debt which one of the partners bound himself as an individual to pay. The action proceeded on an arrestment *jurisd. fund. causa* against that partner, and an arrestment on the dependence of his effects. It was held in a competition with his creditors subsequently arresting, that the decree was effectual, and entitled the holder to a preference (*d*).

A party conveyed property to a company in security of advances to be made, and a partner of the company made advances and sold the property. A creditor of the party having arrested in the hands of the partner and of the company, it was held that the partner and the company were preferable for the advances (*e*).

See, for many instances of competition between companies, their partners and the public, the chapter on Compensation, page 415 (*f*).

Intimation of conveyance not necessary between partners.

Formal intimation is not necessary to complete the assignation of the stock of a partnership by one partner to the other. Two

(*a*) *Burns* v. *Laurie's Trs.*, 1840, 2 D. 1348; but see *Dingwall* v. *M'Combie*, 1822, 1 S. 431, and 1824, 2 S. 567, note; *Gordon* v. *Cheyne*, 1824, 2 S. 566.

(*b*) See *antea*, p. 327.

(*c*) See *per* Lord Cranworth, in *Lumsden* v. *Buchanan*, as reversed 1865, June 22.

(*d*) *Galloway* v. *Liddell and Reid*, 1815, 18 F. C. 202. See *Ewing, May, and Co.* v. *Johnston and Macquoid*, 1813, 17 F. C. 481.

(*e*) *James, Wood, and James* v. *Downie*, 1836, 15 S. 12.

(*f*) See also *Sandeman* v. *Scott*, 1849, 11 D. 405, reversed 1852, 1 Macq. 293, 1 Stu. 882; *Lords of the Treasury* v. *M'Nair*, 1809, 15 F. C. 183.

parties were joint tenants of quarries, and sole partners of a company for working them, and one of them became the landlord, and advanced a sum of money for the other, who, in security, granted an assignation of his share of the concern. There was no publication of the deed or express intimation to the manager of the quarries till within sixty days of the granter's bankruptcy. It was held notwithstanding, that as this was an assignation of the share of a lease, forming part of the stock of a partnership by one partner to another, it did not require formal intimation against the creditors of the granter, but was sufficiently validated by having been acted on, and the assignee was preferred (*a*).

Acceptance by company deposited by a partner.

A partner of a company obtained the acceptance of the company for £400 at a time when his accounts were not settled, and he deposited it with a creditor in security of his own promissory-note, but he did not indorse the acceptance. It was held that the party with whom the acceptance was deposited was entitled to recover the full amount from the company, although it was alleged that not so much was due to the partner (*b*). The authority of this decision has been questioned, but it does not appear on sufficient grounds.

Cases of consignation.

It would seem that when a partner consigns goods, the property of the company, in his own name to an agent for sale, without mentioning that they are the property of the company, the consignee is entitled to compensate with the proceeds of the goods debts due by the partner *privato nomine*, and that he cannot, after a settlement with the consigning partner, be called upon by the company to account for the proceeds. This has not been expressly determined in the case of partners and their companies; but as partnership is only a specialized form of the contract of agency, there can be no doubt that the doctrine here indicated would be given effect to (*c*).

Right of company to rank

On the bankruptcy of a partner, the company is entitled to rank

(*a*) *Russell* v. *Earl of Breadalbane*, 1822, 2 S. 54; remitted 1825, 1 W. and S. 620; 1827, 5 S. 827; aff. 1831, 5 W. and S. 256. See *Hill* v. *Lindsay*, 1847, 10 D. 78.

(*b*) *Hogg* v. *Muir*, *Wood, and Co.*, 1820, 2 Bell's Com. 23, note 5.

(*c*) *Johnston* v. *Scott and Son*, 1818, 19 F. C. 561. See also *Colquhoun* v. *Finlay*, *Duff, and Co.*, 1816, 19 F. C. 208; *Ede and Bond* v. *Finlay*, *Duff, and Co.*, 1818, 19 F. C. 509; *M'Call* v. *Black and Co.*, 1824, 2 Sh. App. 188; *Stuart and Fletcher* v. *M'Gregor and Co.*, 1829, 7 S. 622.

upon his sequestrated estate *pari passu* with his personal creditors; and this right transmits to creditors of the company (*a*). In England, company creditors can only rank on the estate of a partner when his personal creditors have been fully paid (*b*).

on bankrupt estate of partner.

In a competition for a sum due on business accounts by a dissolved firm to a bankrupt, an individual partner of the firm, who was in right of a debt due by the bankrupt, was held entitled to the sum, in preference to a party who was trust-disponee of the bankrupt's heritable estate for behoof of his general creditors (*c*).

Lockhart v. *Ferrier.*

A company consisting of a father and son, and another, having been dissolved by the death of the father, the surviving partners, in ignorance as was alleged of the dissolution, continued to carry on the business, and paid off the debts of the old company. The estates of the new company and its partners having been sequestrated within three years of the father's death, it was held in a competition between the creditors of the old company and of the father on the one hand, and the trustee on the estate of the new company and its partners on the other, for the proceeds of real property which had belonged to the father, and had been taken up by the son, that as the debts of the old company had been paid by the proper debtors, there was no room for adopting the principle of *restitutio in integrum*, as at the date of the father's death (*d*).

Hoskins v. *Christie.*

When a partner has overdrawn his account in the company, and the partners in winding it up after dissolution are, in consequence of this overdrawing, obliged to borrow money, whereby interest is accumulated against the concern, the partner is to be considered not as a mere ordinary debtor, but as an intromitter with the company's funds, and as such liable in accumulated interest after the dissolution, in the same way as had been the practice of the concern prior to its dissolution (*e*).

When partner overdraws his account.

OBLIGATIONS OF COMPANIES TO THEIR PARTNERS.

Companies are as much bound to fulfil all engagements entered into with their own partners, as if they had been entered into with

Companies must fulfil all obligations to partners.

(*a*) *Lusk* v. *Elder*, 1843, 5 D. 1279.

(*b*) Lindley, p. 974.

(*c*) *Lockhart* v. *Ferrier*, 1842, 4 D. 1253.

(*d*) *Hoskins* v. *Christie*, 1845, 8 D. 167.

(*e*) *Blair* v. *Russell*, 1829, 8 S. 72. See *MacIntyre* v. *Maxwell*, 1831, 9 S. 284.

the public. This doctrine depends in Scotland on the principle, that the company is a separate person, whether incorporate or not; in England, it is a consequence of the same principle in corporations; but in unincorporated companies it arises from the fact, that all the partners are joint and several obligors in such cases. No difficulty is generally found in enforcing such obligations in Scotland; in England, their enforcement has too often been found to be impossible (*a*). When a partner sues the firm, or its surviving partners, for implement of such an obligation, he is not obliged to deduct his own share as a partner, when it clearly appears that the obligation was undertaken by the other partners to him; but when he makes advances to the firm for the common good of all, he can only recover his money under deduction of his own share.

Obligation transmits against new firm.

A partner in a manufacturing firm agreed to retire on an agreement by the remaining partners to pay him an annuity 'during such period as he shall survive, and they or their successors in the works and business shall carry on the same.' The whole works, machinery, utensils, and stock having been afterwards sold to another firm, it was held, that in the circumstances of the case, the firm so acquiring the works were the successors of the previous firm in the sense of the agreement, and that as such they were still bound to pay the annuity (*b*).

Where a company, who along with the master were joint-owners of a ship, and as agents for it effected an insurance on it and the master's effects, failed, though desired by him to renew the insurance, which had been vacated by deviation, they were held, on the total loss of the ship, liable for the value of the master's effects (*c*).

BILLS AND NOTES.

Bills and notes.

The modes in which bills and notes may be accepted by companies have already been explained when treating of the powers of partners (*d*). The legal effects of such documents in the case of companies must here be adverted to.

(*a*) Lindley 718.

(*b*) *Alexander* v. *Clark, etc.*, 1862, 24 D. 323.

(*c*) *Petrie's Exrs.* v. *Aitchison and Co.*, 1841, 3 D. 501.

(*d*) *Antea*, p. 229.

Consequences of the separate person.

So distinct in the law of Scotland is the company from the partners, that bill transactions with the company as such on the one hand, or with a partner as such on the other, have little or nothing to do with other claims or obligations for or against the company, or for or against the partners. Thus, a party purchased from a company 'good growing seed,' which was delivered to him in December. For this he granted his bill to one of the partners, and retired it in the subsequent February by another bill to the same partner, who indorsed it to another company of which he was also a partner. The seed having proved unfit for sowing, it was held that the claim of damages arising against the sellers did not form a good ground of defence against the holders of the bill (*a*). So, when a bill was accepted for the accommodation of a company who indorsed it to another company, of which the principal partner was a member of the indorsing company, it was held that the company holding the bill were entitled to the privileges of onerous indorsees (*b*). So it was held not to be a relevant ground for suspending diligence by a company, onerous indorsees of a bill, that one of the partners was a member of a committee of creditors of the drawer, and as such participant in preventing delivery of the goods for which the bill was accepted, and that the acceptor had brought an action of damages against that partner and the other members of the committee (*c*). So, where a partner of a company obtained the acceptance of the company for £400 when his accounts were not settled, and he deposited it with a creditor in security of his own promissory-note, but without indorsing the acceptance, it was held that the party with whom the acceptance was deposited was entitled to recover the full amount from the company, albeit it was alleged that so much was not due to the partner (*d*).

Fraudulent transactions between partner and a stranger do not bind the company.

Though, as we have already seen, partners have implied power to bind the company by accepting bills in its name, yet they have no right to abuse this power for their own purposes; and if, when this has been done, it can be shown that third parties suing the partnership on the bill were privy to the fraud, they will be

(*a*) *Bruce* v. *M'Kenzie*, 1821, 1 S. 78.

(*b*) *Thomsons and Co.* v. *Craig and Hunter*, 1824, 2 S. 647.

(*c*) *Lang* v. *Allan and Co.*, 1831, 9 S. 337.

(*d*) *Hogg* v. *Muir, Wood, and Co.*, 1820, 2 Bell's Com. 23, note 5.

held not entitled to recover. Thus A., one of two partners, having given notice of dissolution to B., the other partner, the latter intimated that he had accepted bills in favour of third parties, and among others of his father, in name of the partnership for alleged partnership debts. A charge having been given to A. on one of the bills accepted in favour of B.'s father, by an indorsee who had indorsed it without recourse, but had afterwards reacquired it, the Court suspended the charge *simpliciter* (*a*). So the drawer of a bill on a company for a private debt due to himself by one of the partners, and accepted by that partner under the company firm in violation of their contract, was held not entitled to recover from the company (*b*); and when a creditor under an arrangement with his debtors drew a bill on a company as for value in an article in which the company did not deal, and the bill was accepted by one of the partners in name of the company, as guarantee for the debtor, which was out of the ordinary business of the company, and the bill was not entered in the books, the company was held not liable (*c*).

Bills accepted after dissolution.

It is to guard against abuses of this kind, as well as for more strictly technical reasons, that the general rule has been established which exempts the members of a dissolved company from liability for bills or notes granted in the company name by some of their number after dissolution for debts which had not been constituted prior to that event (*d*). In such a case, however, the partner granting the bill is personally liable (*e*).

Davidson v. *Robertson.*

When two bills were signed by a partner for the price of goods, the firm was held liable for both when in the hands of onerous indorsees; and it was found that in such a case there is no ground for a multiplepoinding to ascertain what is to be paid (*f*).

Joint adventure.

G., S., and A. entered into a joint transaction on condition that

(*a*) *Waddell* v. *Maclaren*, 1851, 1 Stuart 17. See also *Fortune* v. *Luke*, 1831, 10 S. 115; *Thomson and Co.* v. *Sharp*, 1849, 11 D. 887.

(*b*) *Miller* v. *Douglas*, 1811, 16 F. C. 154.

(*c*) *Kennedy*, 1814, 18 F. C. 122. See also *Johnstone, Sharp, and Co.* v. *Phillips*, 1822, 1 Sh. App. 244, 1 Bell's Com. 401, note 3; *M'Nair* v. *Henderson*, 1803; *Blackwood and Co.* v. *Bower*, 1805 and 1806, 1 Bell's Com. 402, n. 8; *Blair* v. *Bryson*, 1835, 13 S. 901; *North British Bank* v. *Ayrshire Iron Co.*, 1853, 15 D. 782.

(*d*) *Snodgrass* v. *Hair*, 1846, 8 D. 390; *Gordon* v. *M'Cubbin*, 1851, 13 D. 1154.

(*e*) See *Sutherland* v. *Gunn*, 1854, 16 D. 339. See *antea*, p. 233.

(*f*) *Davidson* v. *Robertson*, 1815, 3 Dow 218.

each should have one-third interest for profit and loss; and that the funds should be provided by S. and A. drawing upon G., and discounting and remitting to him the proceeds. S. and A. drew each of them separately on G., who accepted; and they separately discounted the bills and remitted him the proceeds. G. and S. having both failed, and the holder of S.'s bill having claimed payment of the contents from A., it was held, that as the proceeds of that bill had been applied to the prosecution of a joint adventure in which they were all partners, A. was liable in payment (*a*).

Companies are bound by acts of their agents.

In bill transactions, as in other matters of contract, companies are bound by the acts of their accredited agents, whether they are partners or not, in all matters within the sphere of their agency. Thus, where a bill was granted blank in the drawer's name, and thereafter discounted with a bank agent, who filled it up with his own name as drawer, and indorsed it to the bank; and this agent, on the bank re-indorsing it for the purpose of his operating payment, deleted his own name, and caused the party to whom it was originally granted to sign as drawer and also as indorser; it was held in an action at the instance of the bank against the acceptors, that the bank, being identified with the acts of their agent, could not recover (*b*). But the case is different if blame is to be imputed to the party transacting with the agent. Thus, a party at the request of a bank-agent gave him bills which the agent ostensibly discounted, but of which the party allowed him to retain the proceeds for his private accommodation. The agent having become bankrupt, it was held, that although the discount of the bills had been reported to the bank, they were not liable for the money (*c*).

Protests should not be taken by notaries who are partners.

It is a rule of law founded on the most equitable considerations, that a protest of a bill taken by a notary who is the acceptor, indorser, or drawer, is inept (*d*). The principle of this rule obviously applies to partners, who being in the active management of the company's affairs, act as notaries in protesting bills in which the company is concerned. And accordingly it has been observed from the bench, that the managing partner of a bank ought not to

(*a*) *British Linen Co.* v. *Alexander*, 1853, 15 D. 277.

(*b*) *Young's Trs.* v. *Scott*, 1831, 9 S. 574.

(*c*) *Armstrong's Assignees* v. *Leith Banking Co.*, 1831, 9 S. 889.

(*d*) *Russell* v. *Kirk*, 1827, 6 S. 133; *Leith Bank* v. *Walker's Trs.*, 1836, 14 S. 332.

act as notary in protesting bills due to the bank (*a*); but it has been held to be no objection to the validity of a protest of a bill, that the notary, who was indorser without recourse, had some years before been a partner of a company who were the drawers of the bill, and had been subsequently found liable, in respect of insufficient notification of his retirement, for the debts of the company (*b*).

EXTINCTION OF RIGHTS AND OBLIGATIONS.

Extinction of rights and obligations.

The rights and obligations of companies in questions with their own members and the public may be extinguished by *mora* and taciturnity in the same way as those of individuals. Some cases illustrative of the operation of this principle will be found noted below (*c*).

PRESCRIPTION.

Acquisition of rights by prescription.

Corporations may acquire rights by prescription like individuals (*d*); and therefore there can be no doubt that railway companies and the like may in this way acquire or amplify such rights as it is competent for them to possess, having regard to the instru-

(*a*) *Farries* v. *Smith*, 1813, 17 F. C. 360.

(*b*) *M'Kenzie* v. *Smith*, 1830, 9 S. 52.

(*c*) 1. Between partners or shareholders and their companies: *Blackburn* v. *Finlay*, 1848, 10 D. 590; *Blackburn* v. *Buchanan*, 1848, 20 Jur. 199; *M'Laren* v. *Liddell's Trustees*, 1862, 24 D. 577; *Craig* v. *Douglas, Heron, and Company*, 1780, aff. 1781, 2 Pat. App. 575; *Flowerdew* v. *Laing*, 1843, 5 D. 440. It may be remarked, however, that in questions of accounting *inter socios*, delay unaccompanied by something more significant will seldom avail to bar a full investigation at the instance either of partners or their representatives. See *Lister* v. *Sutor*, 1811, aff. 1815, 6 Pat. App. 78; *Maclaren* or *Law* v. *Liddell's Trs.*, 1860, 22 D. 373.

2. Between companies and strangers: *Craig and Co.* v. *Hamilton*, 1823, 2 S. 305; *Hunter and Co.* v. *Levy and Co.*, 1825, 3 S. 425; *Watson and Co.* v. *O'Reilly and Co.*, 1826, 4 S. 480; *Hutchison and Co.* v. *Scott*, 1830, 8 S. 377; *Harford and Co.* v. *Robertson*, 1832, 6 W. and S. 1; *Ogilvie* v. *Duff*, 1834, 12 S. 857; *Forbes* v. *Edinburgh Water Co.*, 1830, 8 S. 459; *Armstrong* v. *Edinburgh and Leith Ship. Co.*, 1825, 3 S. 323; *Mann and Co.* v. *Skinner*, 1829, 7 S. 806; *Hunter* v. *Fleming and Strang*, 1829, 8 S. 234; *Macallum and Co.* v. *M'Keand*, 1847, 9 D. 630; *Moir* v. *Alloa Coal Co.*, 1849, 12 D. 77.

(*d*) See *Ayton* v. *Magistrates of Kirkaldy*, 1833, 11 S. 676; *Magistrates of Hamilton* v. *Duke of Hamilton*, 1846, 8 D. 844, aff. 1850, 7 Bell's App. 1, 22 Jur. 266; *Greig* v. *Magistrates of Kirkaldy*, 1851, 13 D. 975; *Wauchope* v. *York Buildings Co.*, 1781, M. 10706, House of Lords, 1782, 2 Pat. App. 595.

ments and purposes of their formation. It is by no means certain whether the *quasi* person of an unincorporated company can acquire by the long prescription, though the decision in the case of a friendly society would seem to countenance the affirmative view (*a*). They may, however, acquire rights by acquiescence (*b*).

RIGHT TO INTERDICT.

Interdict. Interdict is competent at the instance of companies against their partners, and of partners against their companies, when it can be shown that either of them are doing, or intending to do, something injurious to the rights and interest of the other. Thus interdict was granted against the partner of a company, after he had been sequestrated, from selling by auction bills accepted by him in name of the company (*c*); and the instances are numerous of companies being interdicted by their partners from departing from the provisions of the contract of formation, applying the company funds in an improper manner, etc. (*d*). These matters will be fully treated of under the heading of 'Interdict' in a subsequent part of the treatise.

PUBLIC BURDENS.

Public burdens. Companies are liable to be assessed for poor rates like individuals, when they are possessed of means and estate liable to such assessment. The more important decisions on this subject will be found noted below (*e*).

(*a*) *Kirk-session of South Leith* v. *Scott*, 1832, 11 S. 75.

(*b*) *Moir* v. *Alloa Coal Co.*, 1849, 12 D. 77.

(*c*) *Taylor and Sons* v. *Taylor*, 1823, 2 S. 143.

(*d*) *Learmouth* v. *Leadbitter*, 1841, 3 D. 1192; *Brown* v. *Sir C. Adam*, 1848, 10 D. 744; *Wilson* v. *Glasgow and South-Western Ra. Co.*, 1850, 13 D. 227.

(*e*) Railway Companies: — *Edinburgh and Glasgow Ra. Co.* v. *Meek*, 1849, 12 D. 153; *Glasgow and Ayr Ra. Co.* v. *Abbey Parish of Paisley*, 1850, 13 D. 304; *Edinburgh and Glasgow Ra. Co.* v. *Adamson*, 1853, 15 D. 537; *Edinburgh, Perth, and Dundee Ra. Co.* v. *Arthur*, 1854, 17 D. 252; *Glasgow and Barrhead Ra. Co.*, 1855, 17 D. 1148, aff. 1860, 22 D. (H. of L.) 1; *Edinburgh and Glasgow Ra. Co.* v. *Arthur*, 1858, 20 D. 677; *Croll* v. *Scottish Central Ra. Co.*, 1861, 23 D. 747; *Miller*, 1859, 20 D. 975.

Canal Companies: — *Anderson* v. *Union Canal Co.*, 1839, 1 D. 648; *ibid.* 1847, 9 D. 402.

It may here be noticed that the valuation of subjects acquired by railway and canal companies is struck by the Assessor of Railways and Canals. 17 and 18 Vict. cap. 91, sec. 3. See *Forth and Clyde Canal Co.*, 1859, 24 D. 1453.

Water Companies:—*Hay* v. *Edinburgh Water Co.*, 1850, 12 D. 1240.

Ordinary Companies:—*Buchanan* v. *Parker*, 1827, 5 S. 362; *Bakers of Paisley* v. *Mags. of Paisley*, 1836, 15 S. 200; *Adams* v. *M'Leroy and Co.*, 1851, 14 D. 248; *Walkinshaw* v. *Adams*, 1850, 13 D. 198.

CHAPTER IV.

RIGHT TO SHARE PROFITS AND DIVIDENDS.

General principle.

THE acquisition of gain and its division among the members form the sole purposes of the mercantile partnership. Hence no one can be a partner in the proper sense of the term who is not entitled to share profits; and the enjoyment of this right by any one is perhaps the strongest ground for subjecting him in company liabilities in a question with the public.

Shares and periods of division ought to be fixed in the contract.

The share to which each partner is entitled, and the periods at which a division of the profits is to take place, generally are, and always ought to be, specifically fixed in the instrument of formation, or in some written agreement subsequently signed by all the partners. When this, as sometimes happens, has been neglected, questions of a very embarrassing kind are apt to present themselves.

In absence of such provisions, the proportion of each partner's share is a question for a jury.

In the absence of any written agreement, the proportion in which the several partners are to share profits is a question of fact which it properly falls within the province of a jury to determine, having regard to the whole circumstances of the case and certain rules of law (*a*). As has been seen, it is a fixed principle of law, founded on the most equitable considerations, that wherever a partnership has been proved to exist, every partner is entitled to at least some share of the profits. Beyond this, there is a legal presumption for equality among all the partners, which, *in dubio*, ought to form the rule of division (*b*). But as this is merely a

(*a*) *Campbell's Trs.* v. *Thomson*, 1829, 7 S. 650, as revd. 5 W. and S. 16, 7 Bligh 432; *Aberdeen Town and County Bank* v. *Clark*, 1859, 22 D. 44. See p. 135. See also *Bruce* v. *Ogilvie*, 1813, House of Lords, 1 Dow 38, 5 Pat. App. 706, remitting to take evidence of facts.

(*b*) *Fergusson* v. *Graham's Tr.*, 1836, 14 S. 871; *Struthers* v. *Barr*,

presumption, it may be overcome by evidence *prout de jure* of an agreement to share profits in some other manner, as is often the case when the contributions of skill, of capital, or of connection and interest are unequal.

Suggestions which have been made on this subject.

In such cases it has been said that the extent of the partners' interests in the concern, or, in other words, their rights to share profits, ought in the absence of express stipulations to be measured by the amount of their respective contributions; and there can be no dispute as to the equity of this principle considered in the abstract (*a*). But in practice it will be found extremely difficult of application; for in disputed cases it is often impossible to ascertain the proportionate value of the contributions made by the partners respectively. If, indeed, nothing were to be deemed contribution but money or goods, the problem would become one of great simplicity; but it is evident that such a view would be fraught with absurdity and injustice, since connection, interest, skill, business habits, and many other personal qualifications, are often of far more importance than pecuniary contributions. It has also been suggested that the extent to which a partner is liable *inter socios* to defray partnership losses might be fairly taken as the measure of his right to share profits; yet it is obvious that this cannot be relied on as an invariable rule, for it sometimes happens that a person possessed of great skill in a particular line of business, but of no capital, enters into a partnership with wealthy persons, on the express condition that, in consideration of his operative skill, he shall receive an equal share of profits, while the losses shall be entirely, or to a great extent, borne by them (*b*).

Jury trial the only feasible mode.

These considerations serve to show how peculiarly fitted such questions are for the determination of a jury, and how important it is that nothing calculated to throw light on the matter should be excluded from consideration. Hence the jury are entitled to look at every available kind of evidence, and ought to return their verdict on a sound construction of the whole circumstances of the case (*c*).

1821, 1 S. 122; 1825, 4 S. 119; House of Lords, 1826, 2 W. S. 153; *M'Whirter* v. *Guthrie*, 1822, 1 S. 295.

(*a*) *Struthers* v. *Barr*, *supra*.

(*b*) *Robinson* v. *Anderson*, 20 Beav. 98; *Peacock* v. *Peacock*, 16 Ves. 49; *Farrar* v. *Beswick*, 1 M. and Rob. 527; *M'Gregor* v. *Bainbridge*, 7 Ha. 164; *Benford* v. *Dommett*, 4 Ves. 756; *Finlayson* v. *Rutherford*, 1830, 8 S. 374.

(*c*) See *Stewart* v. *Forbes*, 1 Mac. and G. 137, and preceding cases.

Yet it is important to observe, that they have no right to make a contract for the partners, or to apportion the profits according to any rule which they may consider equitable in the circumstances of the case; neither are they entitled to give effect to what may have been the intention or understanding of some of the partners, however reasonable it may appear, unless they are satisfied that such intention or understanding was raised to a contract by receiving the consent of the others (*a*). Their duty is to inquire, in the first place, whether any special contract or arrangement was ever made on the subject; for, in the absence of this, the presumption of law for equality ought to be taken as the true exponent of the intentions of the partners at formation. But if they shall be satisfied that the matter was specially provided for, it will then become their duty to endeavour to ascertain what the special provisions were (*b*).

Presumption for equality.

It is sometimes said that, according to the existing law of Scotland, there is no presumption for equality in sharing profits; and the case of *Campbell's Trustees* v. *Thomson* (*c*), as reversed in the House of Lords, is appealed to in support of this proposition. But when the decision in that case is taken in connection with the other Scottish authorities, and the circumstances in which it was given, it seems merely to amount to this, that while there is a presumption for equality, that presumption is not *juris et de jure*, but may be rebutted by evidence to the contrary, and that the question is not one to be decided by abstract legal presumptions, but by laying the whole facts of the case before a jury (*d*). This view derives strong confirmation from the consideration that such is, and always has been, the law of England (*e*). The same rules hold good in partnership confined to a single transaction, commonly called a joint adventure (*f*).

(*a*) *Struthers* v. *Barr*, 1821, 1 S. 122; as revd. 1826, 2 W. and S. 153.

(*b*) See *Steward* v. *Forbes*, 1 Mac. and G. 137; *Webster* v. *Bragg*, 7 Ha. 159; *Copland* v. *Toulmin*, 7 Cl. and Fin. 349.

(*c*) 1829, 7 S. 650; revd. and remitted for trial by jury, 1831, 5 W. and S. 16, 7 Bligh N. S. 432.

(*d*) 2 Bell's Com. 645–6. See *antea*, p. 136.

(*e*) See Lindley, p. 573 *et seq.*

(*f*) See *Robinson* v. *Anderson*, 20 Beav. 98; *Webster* v. *Bray*, 7 Ha. 159; *Hauslip* v. *Kitton*, 8 E. Jur. N. S. 835; *M'Gregor* v. *Bainbridge*, 7 Ha. 164, note; *Hobkin* v. *Hog*, 1715, Robert. Ap. 147, rev. judgment of Court of Session; *Keith* v. *Penn*, 1840, 2 D. 633.

An arrangement once made is presumed to continue.

If an agreement for division of profits in a particular manner is established to have once existed, it will be presumed to continue until the contrary is made out. Thus, where the shares of partners were originally equal, proposals made by one of them for an alteration in the proportions, but not definitely assented to, were held of no importance (*a*); and where partners retire, it is presumed that their shares have been taken by those who remain, in the proportions in which these last previously held shares in the concern (*b*). When, however, a second contract altering the proportions in which profits are to be divided, is fairly established, full effect will be given to its provisions (*c*).

Company debts must be paid before division of profits.

Before division, or at least payment of profits, all debts due by the concern ought to be paid off or properly provided for, and arrangements should be made to defray the current expenditure. This mode of procedure, which is only fair to the company creditors, will be found in the end most conducive to the interests of the partners, and is consequently presumed in law to have been their intention. Thus a clause in the contract of a shipping copartnery, relative to the division of 'free profits,' was held to imply gross profits under deduction of repairs on the vessels, etc., and of a sum equivalent to the loss caused by their annual deterioration from age, although a limited sinking fund had been provided 'for upholding the number of vessels necessary for carrying on the company's trade, and meeting any risks which the company may have incurred,' etc. (*d*).

Partner must pay his debts to the company before he can claim profits.

Furthermore, a partner cannot claim any share of profits while he remains debtor to the concern in contribution, indemnity, or any other admitted claim, unless indeed some arrangement has been made by which such claims are to be allowed to lie over for the time. When his share of profits exceeds his liabilities, he will be entitled to the balance after deduction of the latter (*e*).

Profits payable by trustees.

Trust funds are sometimes improperly invested by the trustees

(*a*) *Struthers* v. *Barr*, 1821, 1 S. 122; as revd. 1826, 2 W. and S. 153.

(*b*) *Robley* v. *Brooke*, 7 Bligh N. S. 90.

(*c*) *Buchanan* v. *Lennox*, 1838, 16 S. 824. See, as to the rigid construction of contracts in relation to this matter, *Samuel and Co.* v. *Brown*, 1842, 4 D. 1518; *Ballandene* v. *Glasgow Union Bank*, 1839, 1 D. 1170.

(*d*) *Flowerdew* v. *Dundee Ship. Co.*, 1831, 9 S. 373; aff. 1832, 6 W. and S. 160.

(*e*) *Whytlaw* v. *Coats*, 1800, 4 Pat. App. 148.

in the business of copartneries of which they are members; and when this is the case, they are liable in payment to the beneficiaries of the profits made upon such investments. In computing these, there must be taken into account not only the input capital of the partners, but all other funds obtained on loan or otherwise, and invested in the partnership business; and the proportion which the trust monies bear to the whole funds so employed, regulates the share of profits to be made over to the beneficiaries. Periodical docquets, fixing the interests of the partners *inter se*, are of no importance (*a*).

Times of division.

When no agreement has been made in the partnership contract as to the particular time at which profits are to be divided, and the amount to be divided at any given time, it would seem that the will of the majority will determine such matters (*b*). But this only holds true within certain limits; for when all company obligations and debts have been settled, every partner would seem entitled to insist for at least an annual division of profits, and a refusal to comply with such a demand would seem to form a good ground for dissolution.

How partners may be excluded from profits.

As a general rule, it may be laid down that the right to share profits is indefeasible in every partner, so long as the partnership relation continues. Provisions may, no doubt, be inserted in the contract, empowering a majority to exclude a partner from his share of profits for a time, as a penalty for transgressing some specified rule, just as they may be empowered to expel him from the society altogether; but the exercise of such powers will be very narrowly scrutinized by the tribunals, and will not be sustained where any of the prescribed provisions have not been rigorously adhered to, or where there is the least reason to suspect corrupt motives (*c*). Bye-laws imposing forfeiture of profits as penalties are only valid where they form part of the original contract, or where they have received the assent of every member after the company was brought into existence (*d*).

(*a*) *Cochrane* v. *Black*, 1857, 19 D. 1019.

(*b*) See *Stevens* v. *South Devon Ra. Co.*, 9 Ha. 327; *Browne* v. *Monmouthshire, etc. Co.*, 13 Beav. 32; Powers of Majorities, *antea*.

(*c*) See, as to this, *Harris* v. *North Devon Ra. Co.*, 20 Beav. 384; *Stubbs* v. *Lister*, 1 Y. and C. C. C. 81; *Barton's* case, 4 Drew 535, aff. 4 De G. and J. 46; *Adley* v. *Whitstable Co.*, 17 Ves. 315; 19 Ves. 304.

(*d*) *Adley* v. *Whitstable Company*, *supra*.

Disclaimer of transaction.

A partner may, however, forfeit his share of profits by having disclaimed connection with the transaction or adventure out of which they arose. This not unfrequently happens where a partner, who considers a speculation proposed by his copartners to be more likely to result in loss than in remuneration, intimates to them that he will have no concern in carrying it out. In such a case he is indeed secure from all risk of loss in a question *inter socios*; but he forfeits all share of profit. Thus, where, during the continental war, a British subject and an American citizen were in partnership, and one of them made shipments of goods to the continent of Europe, he was held exclusively entitled to the profits arising on the transaction, in consequence of the other having written letters disclaiming all connection with the goods, though he alleged that these letters had been written to deceive the enemy (*a*). In such cases, however, the disclaimer must be very unequivocal.

PUBLIC COMPANIES.

Equality of shares in public companies.

In public companies, the interest of the members is determined by the number of shares which they respectively hold; and where, as is usually the case, the shares are of equal value, there can be no difficulty in apportioning the amount of profits or dividends (as they are generally termed) to which the holders are respectively entitled. The shareholders, *quoad* the shares held by each, rank *pari passu*; and any attempt to give a preference or priority to some over others is illegal (*b*). Where, however, 'preference shares' have been issued under competent authority, the holders will be entitled to payment of dividends to the amount guaranteed, whatever that may be, before the other shareholders receive any share of the profits (*c*).

Preference shares.

Debts should be paid before dividends.

No dividends should, as a rule, be paid until the existing debts and current expenses of the company have been either paid

(*a*) *Pollock's Reps.* v. *Buchanan*, 1824, 2 S. 581, and 1825, 4 S. 39; aff. 1826, 2 W. and S. 143. See also *Bayne* v. *Kyd*, 1817, House of Lords, 5 Dow 151.

(*b*) See *Adley* v. *Whitstable Co.*, 17 Ves. 315.

(*c*) See *Corry* v. *Londonderry Ra. Co.*, 29 Beav. 263; *Coates* v. *Nottingham Waterworks Co.*, 30 Beav. 86; *Henry* v. *Great Nor. Ra. Co.*, 1 De G. and J. 606; *Crawford* v. *North-East. Ra. Co.*, 3 K. and J. 723; *Stevens* v. *South Devon Ra. Co.*, 9 Ha. 313; *Sturge* v. *East. Counties Ra. Co.*, 7 De G. Mac. and G. 158.

off or provided for; but when the company creditors agree to allow their claims to stand over while the interest is regularly paid, it does not appear to be incompetent to declare a dividend on such surplus of revenue as may arise after the current expenditure has been defrayed. The propriety of adopting this course ought to be determined according to the views of the majority of the shareholders (*a*).

Declaring dividends where no profits have been realized.

It is a most reprehensible, though it has hitherto been a too common practice, for those charged with the management of companies whose affairs are in an embarrassed condition, to declare dividends when no profits have been realized, and to pay them out of the proceeds of loans, or even out of the capital of the company. Such dishonourable and fraudulent proceedings are usually defended as being necessary expedients to maintain the credit of the concern, so as to tide over some temporary crisis in the money market or in the affairs of the company; but they are rarely if ever successful, and only plunge the company and its members in still greater embarrassments. Such practices are grossly illegal, and justly subject those who are concerned in their adoption in personal liability to the full amount of the dividends which have thus been fraudulently declared and paid away (*b*).

Shares not fully paid up.

It frequently happens that there are several classes of shares on which unequal sums have been paid up. When this is so, the dividends should be apportioned not in proportion to the nominal value of the shares, but with reference to the sums actually paid up in each (*c*).

Forged transfers.

Where a forged deed of transfer has been registered by the company in ignorance of the forgery, the dividends must be paid to the true owner; and, from the analogy of the law of England, a multiplepoinding would not in such circumstances appear competent to the company (*d*).

Married women.

When shares are registered in the name of a married woman, the dividends can only be safely paid on the receipt of the husband

(*a*) See *Stevens* v. *South Devon Ra. Co.*, *supra*; *Browne* v. *Monmouthshire etc. Co.*, 13 Beav. 32; *Corry* v. *Londonderry Ra. Co.*, *supra*.

(*b*) *Burnes* v. *Pennell*, 10 D. 689, aff. 2 H. of L. Cases 497, 6 Bell's App. 541 (1849). This was expressly provided by the Companies Act of 1856, 19 and 20 Vict. c. 47, s. 14.

(*c*) *Somes* v. *Currie*, 1 K. and J. 605.

(*d*) *Dalton* v. *Midland Ra. Co.*, 12 C. B. 458, and 13 *ibid.* 474.

or of both spouses; a receipt by the woman will only avail where the *jus mariti* has been excluded (*a*).

Times of payment.

The times at which dividends are to be paid are generally regulated by provisions in the instrument of formation. In the absence of such provisions, the will of a majority will govern. But it must be observed, that neither the board of directors nor a majority of the members will be allowed, contrary to the desires of a dissentient minority, to delay unduly to declare a dividend when free profits exist, or to apply them to other purposes than those contemplated by the instrument of formation (*b*).

Provisions of the Act of 1845.

The following are the provisions of the Companies' Clauses Consolidation (Scotland) Act in relation to dividends:—The company may pay dividends on the receipt of the party in whose name the shares stand in the company books; and if they stand in the names of more persons than one, then on the receipt of the party first named and surviving. No attention need be paid to trusts, though duly notified (*c*). Interest on mortgages or bonds must be paid in preference to dividends (*d*). No dividend shall be paid out of capital (*e*); and before apportioning the profits, the directors may set aside a fund for contingencies, or for repairs and improvements (*f*). Previously to every meeting at which a dividend is intended to be declared, a scheme must be prepared by the directors, showing the profits which have accrued since the last meeting at which a dividend was declared, and apportioning the same, or as much as they consider applicable to the purposes of dividend, among the shareholders, according to their respective shares, the amount paid thereon, and the periods during which the same has been paid. This scheme must be laid before the meeting; and if approved, the dividend is declared in accordance therewith (*g*). No dividend is payable in respect of any share until the calls payable on all shares held by the owner thereof have been paid (*h*).

Observations

In relation to these provisions, it may be noticed that after a dividend has been declared, each shareholder entitled to participate has a separate and independent right to recover his proportion, and may

(*a*) See *Gardners* v. *Royal Bank*, 1815, 18 F. C. 458.
(*b*) *York and North Midland Ra. Co.* v. *Hudson*, 16 Beav. 485.
(*c*) Sec. 21.
(*d*) Sec. 51.
(*e*) Sec. 124.
(*f*) Sec. 125.
(*g*) Sec. 123.
(*h*) Sec. 126.

make it good against the company by action at his own instance (*a*). The English courts have refused to restrain a company from paying a dividend on the mere ground that the directors had acted in violation of their duty to the public (*b*); and a lien on shares is supposed to give as an accessory a right to recover dividends accruing therefrom (*c*).

Provisions of the Act of 1862.

If companies registered under the Act 1862 adopt Table A, Schedule I., as their articles of association, the following will be the provisions applicable to dividends:—The directors may, with the company's sanction in general meeting, declare a dividend to be paid to the members in proportion to their shares (No. 72); dividends can be paid out of profits only (No. 73). Before recommending a dividend, the directors may set aside out of the profits a sum to meet contingencies, to equalize dividends, or to repair and maintain the company works; and they may invest this sum on such securities as they see fit (No. 74). The directors may deduct from the dividends payable to any member all sums due from him to the company in name of calls or otherwise (No. 75). Notice of any dividend that has been declared must be given to each member by personal service or transmission through the post, prepaid, and addressed to him at his registered place of abode (Nos. 76, 95, 96, 97). All dividends unclaimed for three years after having been declared, may be forfeited by the directors to the company (No. 76). No dividend bears interest against the company (No. 77).

General provisions.

It is further provided by sec. 38, No. 7, as a rule applicable in all cases, that in the event of the company being wound up, no sum, due a member *as such* by way of dividends or profits, shall be deemed to be a debt due by the company, payable to such member in a competition between himself and any other creditor who is not a member of the company; but every such sum may be taken into account in a final adjustment of the contributories among themselves (*d*).

Provisions of the Act of 1856.

The provisions of the previous Act of 1856 are somewhat similar. They will be seen by reference to Table B in the Schedule, Nos. 63 to 68.

(*a*) See *Carlisle* v. *South-East. Ra. Co.*, 6 Ra. Cas. 670; Hodges, p. 79.

(*b*) *Browne* v. *Monmouthshire Ra. Co.*, 20 Law Jour. (Chan.) 497.

(*c*) *Hague* v. *Dandeson*, 2 Ex. 741.

(*d*) See, in connection with this, sec. 101.

CHAPTER V.

RIGHT TO SHARE IN MANAGEMENT.

Right to share in management.

THIS right is of such importance to protect the interests of the individual members, not merely against possible fraud on the part of their fellows, but against the consequences of their oversight, negligence, or dereliction of duty, that it is hard to conceive the existence of the partnership relation with any one who is not entitled to its exercise in some form or other. It is true that in a private firm the power of agency may be wholly or in part withdrawn from some of the copartners, and confided to others more fitted for its exercise; and that in public companies it never resides in the members generally, but is always committed to managing officials specially charged with the executive administration; yet this does not in the least degree affect the rights of a latent or dormant partner, or of a shareholder, to take part in the management of the concern of which he is a member, to discuss every proposed measure, to vote for or against its adoption, and to check any departure from the objects of the undertaking, and any abuse of power on the part of those charged with the active management, or of the members generally (*a*). Hence any attempt by some of the partners to exclude the others from taking part in the management, will at once be checked by the Court (*b*). It has been held in England, that though one of two partners mortgages all his share and interest in the concern to the other, the latter will not be permitted during the continuance of the partnership to

(*a*) *Dickson* v. *Dickson*, 1823, 2 S. 413; and *Paul* v. *Taylor*, 1826, 4 S. 580. See also *antea*, p. 107, and *Lloyd* v. *Loaring*, 6 Ves. 777.

(*b*) See *Dickson* v. *Dickson*, *supra*; *Marshall* v. *Colman*, 2 Jac. and W. 266; *Goodman* v. *Whitcomb*, 1 Jac. and W. 589.

exclude the other from the management (*a*). And the fact of one partner being practically excluded from the exercise of this right, has been held to be a sufficient ground for the appointment of a receiver (*b*) (judicial factor) to manage the concern.

Modes in which this right is exercised.

This right is generally exercised by voting at meetings, ordinary or extraordinary, convened for the purpose of examining into the management and of passing resolutions. Every partner is entitled to be heard, as well as to vote; and the fact of his not being present, in consequence of want of due notice, may be fatal to the validity of the proceedings. In general, his power to affect the management is confined to the value of his vote; but there are some cases in which his single refusal to concur in a proposed measure will render it incompetent. Of this kind are attempts to change the nature of the business (*c*), to travel out of the sphere of operation for which the company was formed (*d*), or to do something forbidden by, plainly at variance with, or obviously not contemplated in, the instrument of formation (*e*).

RIGHT TO INSPECTION OF COMPANY BOOKS.

Right of access to company books.

The right which every partner possesses to take part in the management of the company, necessarily involves that of making himself fully cognizant of the state of its affairs. Deprived of this, his chances of sharing profits might be found very illusory; and he might often be involved in ruinous liabilities and losses which he could neither foresee nor prevent. It has therefore come to be regarded as a fixed and fundamental principle of the law of partnership, that every partner is entitled to insist that the company books and accounts shall be accurately kept, and be at all times patent to his inspection (*f*). So important are these rights con-

(*a*) *Rowe* v. *Wood*, 2 Jac. and W. 558.

(*b*) *Wilson*, 1 Swanst. 471; *Clegg*, 1 Mac. and G. 294.

(*c*) *Maxton* v. *Brown*, 1839, 1 D. 367; *Fleming* v. *Campbell*, 1845, 7 D. 935.

(*d*) *Brown* v. *Adam*, 1848, 10 D. 744; *Balfour's Trs.* v. *Edin. and Nor. Ra. Co.*, 1848, 10 D. 1240; *Wilson* v. *Glasgow and South-West. Ra. Co.*, 1850, 13 D. 227. See also *Williamson* v. *North Brit. Ra. Co.*, 1846, 9 D. 255; *Wedderburn* v. *Scottish Central Ra. Co.*, 1848, 10 D. 1317; *National Ex. Co.* v. *Glasgow and Ardrossan Ra. Co.*, 1849, 11 D. 571.

(*e*) See Powers of Majorities, and previous cases.

(*f*) *Per* Lord Eldon in *Rowe* v.

sidered to be, that they are generally made the subject of special provisions in the partnership contract. In private firms it is usual to entrust the keeping and custody of the books to one of the partners, and it is not uncommon to delegate these duties to a paid assistant or bookkeeper; but whatever arrangement of this kind may be made for purposes of convenience, it is quite settled law, that no partner is entitled to retain the books in his own exclusive custody, to remove them from the place of business, or to put any bar in the way of their being examined and scrutinized by his copartners (*a*). So fully, indeed, is this principle recognised, that if a partner chooses to enter the partnership accounts in a private book among his own personal matters, this, instead of excluding the scrutiny of his copartners, may entitle them to inspection of all that the private book contains (*b*).

Restrictions on this right.

Sometimes, when the nature of the business seems to require it, though this can be but of rare occurrence, it is made a provision of the copartnery contract, that the partners generally shall not have access to the books, but that they shall remain under the sole control of those charged with the active management of the concern. Such provisions are not favourites of the law; and they will not be permitted to stand in the way of a rigid scrutiny, if a case calling for investigation is relevantly alleged (*c*).

Case of public companies.

In public companies with a large and fluctuating membership, the duty of keeping the books and accounts of the concern is necessarily entrusted, like other matters of ordinary management, to the managers or directors. This does not, however, derogate from the right of the shareholders to inspect and scrutinize them. Yet, as it could serve no good purpose, and might often be productive of mischievous consequences, to leave the company books and accounts continually open to the inspection of shareholders, it is usual to insert in the contract certain provisions fixing the times at

Wood, 2 Jac. and W. 358, 359, and 558; *Goodman* v. *Whitcomb*, 1 Jac. and W. 593; *Cameron* v. *M'Murray*, 1855, 17 D. 1142; *M'Gregor* v. *M'Gregor*, 1823, 2 S. 413.

(*a*) *Greatrix* v. *Greatrix*, 1 De G. and S. 692; *Taylor* v. *Davis*, 3 Beav. 388; *Charlton* v. *Poulter*, 19 Ves. 148; *Taylor* v. *Rundell*, 1 Y. and C. C. C. 128; *Stuart* v. *Bute*, 12 Sim. 460.

(*b*) *Freeman* v. *Fairlie*, 3 Mer. 43; *Toulmin* v. *Copland*, 3 Y. and C. Ex. 655.

(*c*) *Collins* v. *North British Bank*, 1850, 13 D. 349.

which they shall be open for inspection, and any restrictions on the exercise of this right which may be deemed advisable. Such provisions and regulations are binding (*a*); but they will be fairly construed by the Court, and will not be interpreted so as to afford occasion for fraudulent or even unjustifiable concealment (*b*). Thus, when the contract of a banking company prohibited the shareholders from access to the books, it was held that this provision was applicable only to the case of fair and ordinary management on the part of the directors, and did not bar a shareholder from insisting on exhibition when he had relevantly libelled an action of fraud against the directors (*c*).

Where restrictions are binding.

Restrictions of any kind on the common law right, which every shareholder, in virtue of being a partner, has to inspection of the company's books, are only effectual where they have received the assent of all the members of the association, adhibited in the instrument of formation, or at some subsequent period when that is competent. They cannot be imposed by resolutions of directors, or even, it should seem, by the will of majorities (*d*). Were this otherwise, shareholders might be deprived of a powerful means of checking malversation at the very time when its possession was of greatest importance. If directors are required to depone to the contents of the company books, they cannot plead ignorance on the ground of having been excluded from their inspection by their co-officials. They ought to have enforced the rights, since they chose to undertake the duties, of the office (*e*).

Right of inspection must be exercised with discretion.

Shareholders, like partners, are bound in all company matters to pay due regard to the common interests; and hence they are not entitled to abuse their right of inspecting the company books by publishing their contents to strangers, particularly when the company is involved in litigation (*f*). And for this reason, when, by a company's special act, shareholders were declared entitled to

(*a*) *Baldwin* v. *Lawrence*, 2 Sim. and Stu. 184; *Williams* v. *Prince of Wales Life Co.*, 23 Beav. 338.

(*b*) *Hall* v. *Connell*, 3 Y. and C. Ex. 707.

(*c*) *Collins* v. *North British Bank*, 1850, 13 D. 349. Here the Court remitted to an accountant to examine the books and report. See *Hall* v. *Connell*, 3 Y. and C. Ex. 707.

(*d*) See *Taylor* v. *Rundell*, 1 Y. and C. C. C. 128; *Stuart* v. *Bute*, 12 Sim. 460.

(*e*) See last cases.

(*f*) *Williams* v. *Prince of Wales Co.*, *supra*.

inspection of the books at all seasonable times, the English courts have refused to enforce this right by *mandamus*, unless the petitioner could show that he had been denied inspection by the managing body, after alleging as a ground for his application a purpose which seemed reasonable to the Court (*a*).

Modes of keeping partnership books.

It would be out of place in a work of this kind to enter into any detailed examination of the different modes of bookkeeping which have been recommended for adoption in private companies and firms, or to pass any judgment on their respective merits. It may be observed, however, that in making choice of a particular method, attention should be given to the nature of the business, and the manner in which it is intended to be carried on. When it does not involve numerous details, and when the partners are not familiar with the refinements of bookkeeping, the more simple the method adopted, so that it have the merit of clearness, the more likely will it be to serve the purpose intended. If, again, the company transactions are numerous and complex, a more artificial and elaborate system of bookkeeping will be required, and the aid of a trained assistant may be advisable. But whatever may be the principles of the system adopted in other respects, it is of essential importance that the firm be treated as a separate person, and that the partners be dealt with as its debtors and creditors. This method of keeping partnership accounts will be found of excellent use in cases of dissolution, and of the death, embarrassment, or bankruptcy of a partner; and it has the advantage of being in exact conformity with the Scottish theory of partnership law, which recognises the *quasi* person of the firm. Even in England its simplicity and practical utility have led to its general adoption among mercantile men.

Arrangements as to keeping and custody of the books, etc.

It will often be found convenient to entrust the duty of keeping the partnership books to some one of the partners in particular, sometimes to a paid assistant, subject of course in all cases to the supervision of the partners generally. Arrangements of this kind may well be introduced into the contract of copartnery, which should also contain a provision that the books are to lie at the office of the company, and open to the inspection of every partner. This last

(*a*) See *Reg.* v. *Wilts and Berks Canal Co.*, 3 A. and E. 477; *Reg.* v. *Clear*, 4 B. and C. 899.

provision, which is a mere affirmance of the common law, has the advantage of preventing misconceptions or disputes.

Partners bound to keep accurate books.

A partner is not only entitled to a full inspection of the company books and accounts, but also to expect that his copartners will, in so far as they are concerned, keep them in a fair and intelligible manner, and communicate to him all that they may know about the state of the company affairs. Hence, if a partner, knowing well the true state of the partnership accounts, should take advantage of this knowledge to make an advantageous agreement with his copartner who was not so well informed, such agreement would be liable to reduction on the head of fraudulent concealment (*a*). Hence, if in judicial proceedings for accounting between partners, it turns out that no books of accounts have been kept, that they have been destroyed, are wrongfully withheld, or have been so kept as to be unintelligible, every presumption will lie against the partner to whose negligence or misconduct this state of matters is imputable (*b*). And though it has been agreed, that when accounts have once been made out, examined, and signed, they shall not afterwards be disputed; yet if a partner induces his fellows to sign a fabricated and untrue account in ignorance of its real character, it may be opened up at any time on this being established (*c*).

Special provisions in incorporated companies.

In companies erected under public authority, special regulations are generally made by the charter or special act for the proper keeping of the company books and accounts, and for affording the members due opportunities of examining and making excerpts from their contents. These provisions are always construed by the courts in such a way as to prevent concealment on the one hand, and unnecessary or hurtful publicity on the other.

Companies Act 1845.

The provisions of the Companies' Clauses Consolidation (Scotland) Act, in so far as they relate to the rights of shareholders to take part in the company management, and to inspect and examine the books and accounts, will be found noticed between pages 123 and 131. Their import and application will, however, be best apprehended by a careful study of the Act itself. Any further notice in this place would be a mere unnecessary repetition.

(*a*) See *Maddeford* v. *Austwick*, 1 Sim. 89.

(*b*) *Gray* v. *Haigh*, 20 Beav. 219; *Walmsley* v. *Walmsley*, 3 Iv. and Lat. 556.

(*c*) *Oldaker* v. *Lavender*, 6 Sim. 239.

Letters Patent Act.

The mode in which members of companies brought under the operation of the Letters Patent Act take part in the management and are enabled to inspect the whole proceedings, is explained at page 119 and the following pages.

Companies Act of 1862. General provisions.

The provisions of the Companies Act of 1862, in relation to the matters now under consideration, are as follows: Every company under the Act must cause minutes of all resolutions and proceedings of general meetings, and of the directors and managers, where there are such officials, to be duly entered in books to be kept for the purpose. Every such minute, if bearing to be signed by the chairman of the meeting to which they relate, or by the chairman of the next succeeding meeting, is to be received as evidence; and until the contrary is proved, meetings and proceedings of which minutes have been so made, are to be deemed duly convened and transacted; and all appointments of directors, managers, or officials, and all acts done by them, are to be considered valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications (sec. 67). The company may by special resolution appoint inspectors to examine into the state of its affairs (sec. 60); and for still greater protection, the Board of Trade is empowered to order an inspection on being applied to by a certain proportion of the members (secs. 56, 59). See, as to this, *antea*, page 117. The members are also empowered by special resolution to alter the constitution and regulations of the company within certain limits, as explained at page 117; and to have it wound up (secs. 79 and 129), as will be more fully considered in the chapter on 'Winding up.'

Provisions of Table A, Sch. I.

Beyond these provisions, the Act does not make any compulsatory regulations as to the manner in which the books and accounts are to be kept, the officials appointed, or the members are to participate in and control the general management. But if the provisions laid down in Table A be adopted as the articles of association, an admirable body of regulations will be obtained for these purposes. As the adoption of these regulations is not compulsatory, and as to appreciate and apprehend them properly they must be carefully studied as they stand in the Act, they were merely referred to in the chapter on Management. As, however, it is understood that they are generally adopted in their entirety where the company has a numerous membership, it has been thought

that the following *resumé* of these provisions may not be out of place. They assume that the management is by a board of directors, and in general complexion their provisions closely resemble those of the Companies Act of 1845, but are in some respects more perfect and complete. The first general meeting is held at such time and place as the directors may appoint, and not later than six months after registration (No. 29). Subsequent general meetings are held as appointed by the company in general meeting, and in the absence of such appointment on the first Monday in February, at a place appointed by the directors (No. 30). These general meetings are styled ordinary, all others extraordinary (No. 31). The directors may, when they think fit, and must on a requisition of one-fifth of the members, call an extraordinary general meeting (No. 32). The requisition must express the object of the meeting, and must be left at the registered office (No. 33). In default of the directors calling a meeting within twenty-one days, the requisitionists, or other members to the required amount, may convene it themselves (No. 34). Meetings.

Seven days' notice of the place, day, and hour, and the special business, if any, of the meeting, must be given to the members; but the non-receipt of notice by a member does not invalidate the proceedings (No. 35). All business at an extraordinary meeting, and all at an ordinary one, is deemed special, except sanctioning a dividend, and considering accounts and reports of directors (No. 36). Notice of, and business at, meetings.

No business can be transacted without a quorum, which is five if the company consists of ten members, adding one for every additional five members up to fifty, and one for every ten beyond that number; but in no case can the quorum exceed twenty (No. 37). If within one hour a quorum has not assembled, the meeting is dissolved, if called on the requisition of members, and in any other case stands adjourned to the same day next week, when, if a quorum is still wanting, it is adjourned *sine die* (No. 38). Quorum.

The chairman of the directors is the chairman of the meeting (No. 39); but if he does not appear within fifteen minutes, the members choose one of their own number (No. 40). The chairman may, of consent, adjourn from time to time, and place to place; but adjourned business only can be transacted at an adjourned meeting (No. 41). Chairman.

Unless a poll is demanded by five members, the declaration of the Poll.

chairman and an entry in the book of proceedings form sufficient evidence of a resolution having been carried (No. 42). If a poll is demanded, it is taken as the chairman directs, and he has a casting vote in cases of equality (No. 43).

Voting. Every member has one vote for every share up to ten, one for every additional five up to a hundred, and one for every ten shares above that number (No. 44). Lunatics and idiots vote by their legal guardians (No. 45). When shares have joint owners, he whose name stands first on the register is alone entitled to vote (No. 46). No one can vote whose calls are unpaid, nor can any one vote on a share which he has not held for three months, unless at a meeting held within three months from registration of the company (No. 47). Votes may be given by proxy (No. 48), provided it is in writing signed by the appointer, or under the seal of a corporation, and attested by at least one witness: proxies must be members (No. 49). The instrument appointing the proxy must be deposited at the company's registered office seventy-two hours before the meeting; and no proxy is valid after twelve months (No. 50). The Act gives a form (No. 51).

Proxies.

Directors. The number and names of the first directors are determined by the subscribers, who act as directors till these officials are appointed (Nos. 52 and 53). Their rate of remuneration is fixed in general meeting (No. 54). They may act, notwithstanding a vacancy in their number, may pay the costs of getting up and registering the company, and can exercise all powers not confined to general meetings. They are subject to the control of general meetings. But subsequent regulations do not invalidate their previous acts (Nos. 55, 56). A director vacates his office by accepting a place of trust under the company, by bankruptcy or insolvency, and by being concerned in the profits of any contract with the company; but not by being member of another company having contracts with that of which he is a director, though he cannot vote in relation to such matters (No. 57). At the first ordinary meeting after registration the whole directors retire; and at the first ordinary meeting in each subsequent year, one-third of their existing number, or if that is not a multiple of three, as near a number to one-third as possible (No. 58). During the first and second years after the first meeting the directors retire by ballot, afterwards the one-

Vacating of office, and retirement.

third who have been longest in office (No. 59). These are re-eligible (No. 60). The vacancies are filled up by the general meeting at which the retirement takes place (No. 61). If the election does not take place, the meeting stands adjourned to the same day next week, at the same time and place; and if the vacancies still remain unprovided for, the former occupants continue in office till the ordinary meeting in the ensuing year, and so on, till the vacancies are supplied (No. 62). A general meeting may increase or reduce the number of directors, and may determine in what rotation they are to retire (No. 63). Casual vacancies may be filled up by the directors, but persons so chosen retain office no longer than would have been competent to those for whom they were substituted (No. 64). A director may at any time be removed by a special resolution, and his place may be supplied by any one appointed by an ordinary resolution; but such substitute retains office for such period only as would have been competent to his predecessor (No. 65).

Filling up vacancies.

Removal.

The directors fix their own meetings, determine their quorum, and nominate their chairman. They proceed by majorities, the chairman having a casting vote. Any director may call a meeting (Nos. 66, 67). They may delegate any of their powers to committees, who are empowered to call meetings, transact business, and appoint chairmen in the same way as the directors (Nos. 68, 69, 70). The acts of directors, their committees, or of any one acting as a director, are valid, notwithstanding the subsequent discovery of some defect in their appointment (No. 71).

Proceedings of directors.

Committees.

CHAPTER VI.

RIGHT AND OBLIGATION TO ACCOUNT AS BETWEEN COMPANIES AND THEIR PARTNERS OR MEMBERS.

Origin of right to enforce an accounting.

THE right to share profits and the liability to incur loss consequent on the partnership relation, necessarily involve mutual rights of accounting between the company and its partners, and between each partner and his fellows, in all matters relating to the partnership. Every person who is a partner in the proper sense of the word is entitled to exercise this right (*a*). When no settlement or discharge has taken place, it is not lost by retirement or dissolution, but transmits to executors and representatives (*b*), and seems to be determined by the long prescription only (*c*).

Mode of procedure in England and Scotland respectively.

In England this right is made good by a bill in equity for an account and discovery (*d*), and can seldom be rendered available by an action at law. In this country the mode of procedure is generally by action of count and reckoning; sometimes a multiplepoinding may be found a more commodious method; and conclusions of declarator or reduction may often be rendered necessary in aid of those for accounting. When the action is brought by persons alleging themselves to be partners, it ought to be preceded by or combined with declarator (*e*); for until the fact of partnership is either admitted or established, the pursuer can have no title (*f*). And when a deed of settlement or discharge bars the way, a reduction will be necessary. The right to compel accounting may sometimes be made available by way of defence; but unless the principal

(*a*) 2 Bell's Com. 645 *et seq.*

(*b*) *Lister* v. *Sutor*, 1811, aff. 1815, 6 Pat. App. 78; *M'Laren* or *Law*, *etc.*, v. *Liddell's Trs.*, 1860, 22 D. 373.

(*c*) Previous cases.

(*d*) Lindley 803.

(*e*) Lindley 739.

(*f*) *Fraser* v. *Hair*, 1848, 10 D. 1402.

action be one of count and reckoning, a defence of this kind will generally require to be pleaded by way of action (*a*). Of course, it may be pleaded by any of the claimants in a multiplepoinding to dispose of partnership property.

To whom competent.

The right to demand an accounting is competent to the company against one or more partners, or to one or more partners against the company; or, in other words, proceedings to enforce it may be taken by any of the partners or their representatives against the others or their representatives. It is not, however, competent to or against *quasi* partners, that is, persons who are merely liable as such *quoad* the public, unless where they have been compelled to pay company debts, when it will take the form of an action of relief, reparation, or damages, or where they have shared or intromitted with company property. But by whomsoever raised, and in whatsoever form, this action, like all others *inter socios*, must bring all the partners or their representatives into the field, either as pursuers or defenders. If the concern be still undissolved, it may appear in any of the three ways in which, as we shall afterwards see, mercantile copartneries may sue and be sued; but if dissolution has taken place, all the late partners and the representatives of those deceased must be made parties (*b*). The reason of this is, that whether the company sues a partner, or a partner the company, the action still resolves into a mutual accounting among the partners; and unless all were in the field, the defender would not be in safety to make payment, and the share of an absent partner might be demanded, though it had *de facto* been already paid or compensated. The same rule obtains in England (*c*).

Sub-partners have no right to account as against the firm.

It is held in England that a sub-partner has no right to an account from the principal firm, because between it and him there is no privity of contract. His right lies against the particular partner only with whom he is sub-partner (*d*). This, however, may be got over by assignation, legal or conventional (*e*).

(*a*) See *Fife Bank* v. *Holliday*, 1831, 9 S. 693.

(*b*) *Bell* v. *Willison*, 1822, 1 S. App. 220; *M'Intyre* v. *Maxwell*, 1831, 9 S. 284; *Jardine's Trs.* v. *Carron Iron Co.*, 1862, 24 D. 443.

(*c*) *Hills* v. *Nash*, 1 Ph. 594.

(*d*) *Brown* v. *De Tastet*, Jac. 284; *Bray* v. *Fromont*, 6 Madd. 5. See Lindley, p. 804.

(*e*) See *Fawcett* v. *Whitehouse*, 1 R. and M. 132; *Bentley* v. *Bates*, 4 Y. and C. Ex. 182.

Accounting may be limited.

The accounting sought for does not require to include or have reference to the whole dealings or business of the company; it may be confined to a single transaction (*a*).

Enforcement of this right generally infers dissolution.

When the members of private firms or companies get into such a state of misunderstanding with each other, that nothing short of the interference of the public tribunals can set their affairs in order, a dissolution is almost always required, in order that equal justice may be done to all concerned. This obviously follows from the consideration, that until the concern is wound up it must always be difficult, sometimes impossible, to ascertain the profits to be divided, or to set these off and apportion them with reference to the claims of contribution and indemnity which partners may have against the company, or the company against individual partners. It is, moreover, highly undesirable, whether regard be had to the interests of creditors or of the partners themselves, that a company should be allowed to go on to contract further liabilities, when the management has been found so defective as to require judicial interference, and when that confidence which is essential to the success of combined action has been necessarily impaired, if not entirely destroyed, by some of the partners taking legal proceedings against the others.

English practice.

It must therefore be taken as a strong proof of the sagacity of the English Equity Courts, that they early laid down the rule not to interfere in taking accounts between partners, unless on condition that the concern should be wound up (*b*). In the later practice, it is true, this rule has been somewhat modified; but the exceptions are such as rather to elucidate the principle (*c*). Thus, the rule will not be enforced in the case of common law companies of large membership, managed by officials—here the reason of the rule fails; nor in cases where a partner purposely misconducts himself so as to force a dissolution against the interest of his copartners (*d*); nor where, from the partnership being for a term of years, it was not in the power of the partner seeking relief to bring it to termination, for if the Court refused the bill, all remedy would be denied (*e*).

(*a*) *Hunter* v. *Cochrane's Trs.*, 1829, 8 S. 171, and 9 S. 477; *M'Intyre* v. *Maxwell*, 1831, 9 S. 284.

(*b*) *Loscomb* v. *Russell*, 4 Sim. 8; *Forman* v. *Homfray*, 2 V. and B. 329; *Knebell* v. *White*, 2 Y. and C. Ex. 15.

(*c*) See *Hutchinson* v. *Wright*, 25 Beav. 444; *Poole* v. *Masterman*, 21 Beav. 61.

(*d*) *Fairthorne* v. *Weston*, 3 Ha. 387.

(*e*) *Walworth* v. *Holt*, 4 M. and Cr. 619.

Scottish practice.

In Scotland, where, from the forms generally assumed by actions between partners and their firms, the equitable jurisdiction of the Court can rarely come into play, it does not appear that any rule of this kind has ever been laid down; but it is probable that a dissolution would be obtained by the intervention of the Court, if, from the legal proceedings between the partners, it was plain that the common interests were on the highway to ruin.

Miscellaneous cases.

Some cases may here be noticed as illustrative of the principles by which the courts proceed in actions of accounting *inter socios*. Two parties, as a speculation, purchased an estate under an agreement that the portions remaining unsold after a certain date should be valued by neutral men mutually chosen. In the course of a process of accounting between them, one proposed to the other that the latter should name a price for a certain portion remaining unsold, which he would willingly either give or take for it, and he named a price accordingly; the Court held that the party making this proposal was barred from thereafter resorting to the mode of settlement by valuation pointed out by the agreement (*a*). By the contract of copartnery of a company carrying on trade between Glasgow and Canada, it was provided that the partners in Canada should annually transmit to those in this country copies of their books docqueted, as balanced at the end of each year; and that these, when approved of, should 'be deemed and taken as evidence in any question that might arise between the partners.' The books were regularly transmitted by the managing partner for twelve years. At the end of that time an agreement was entered into at Glasgow that he should retire on receiving £49,600, under deduction of £5200, being the supposed balance due on his private account at the 1st of January preceding; and that if that balance should be found to be more or less than £5200, the difference should be paid by or to him. In an action of accounting, it was held that it was not competent for the remaining partners to enter into an investigation of the books already transmitted to Glasgow, or to object to charges therein contained (*b*). A merchant and manufacturer entered into a contract, by which they agreed to ship goods for sale to South America, in which each was to have an interest

(*a*) *Hunter* v. *Cochrane's Trs.*, 1829, 8 S. 171, and 9 S. 477.

(*b*) *Pollock, Gilmour, and Co.* v. *Ritchie*, 1851, 13 D. 640.

of one-half profit and loss, and the merchant was to have an interest of one-fourth profit and loss of the goods manufactured and sent by the other, invoiced at the fair market price, and in the event of loss, to be stated at cost price. The manufacturer furnished goods made by himself at the market price, on which there had been a loss, though, if they had been stated at the cost price, there would have been a profit. In an action of accounting between the partners, it was held that the merchant could not insist on the goods being stated at cost price so as give him a profit (*a*). In an action of count and reckoning for the adjustment of partnership accounts, an unstamped acknowledgment of the receipt of money was tendered in evidence of which was the particular partner by whom a payment (which was admittedly made to a creditor) had been made. It was held inadmissible (*b*).

Right to account does not exist among wrong-doers.

The right to demand an accounting does not exist in societies of wrong-doers, or in partnerships whose business is carried on in violation of statutory enactments. Thus, when a joint adventure was formed for the purpose of carrying on the slave-trade, it was held that one partner had no right to raise an action of accounting against the other (*c*). And an action of accounting at the instance of a party alleging himself to be a partner of a pawnbroking company who carried on business concealing the name of the pursuer and other partners, in violation of Act 29 and 30 Geo. III. c. 99, was dismissed as incompetent (*d*). If, however, the illegality does not inhere in the nature of the business, or in the mode in which it is arranged to be carried on, but attaches to acts of some of the partners only, this will not bar an action of accounting at the instance of the others, who have not so compromised themselves (*e*).

Defence against accounting.

An action for accounting against an alleged partner, or against a company, may be met by a denial of the existence of the partner-

(*a*) *Samuel and Co.* v. *Brown*, 1842, 4 D. 1518.

(*b*) *Scott* v. *Bird*, 1845, 8 D. 25. See also *Ewing* v. *Chrichton*, 1827, 4 Mur. 184; *Flowerdew* v. *Dundee Ship. Co.*, 1831, 9 S. 373, aff. 1832, 6 W. and S. 160.

(*c*) *Gibson* v. *Stewart*, 1828, 6 S. 733, and 1835, 14 S. 166, 12 S. 683; aff. 1840, 1 Robin. App. 260.

(*d*) *Fraser* v. *Hill*, 1852, 14 D. 335.

(*e*) See *Campbell* v. *Campbell*, 1834, 12 S. 573, 7 Cl. and Fin. 166, 1 Rob. App. 1; *Gordon* v. *Howden*, 1843, 5 D. 698, revd. 1845, 4 Bell's App. 254, 17 Jur. 329; *Pearson* v. *Skelton*, 1 M. and W. 504. See also *antea*, p. 344.

ship relation between the pursuer and defender (*a*). To obviate objections of this kind, where the existence of partnership is not established *scripto*, and in an unambiguous manner, the conclusions of count and reckoning should be coupled with those of declarator, otherwise a summons of declarator may have to be repeated *incidenter*. The want of the declaratory process in England has led to much embarrassment in suits for account and discovery (*b*). When the defender is not absolutely certain that the partnership relation has not been created,—a question sometimes attended with considerable difficulty,—he ought, while stating this defence, to plead at the same time to the conclusions of count and reckoning, and to state all facts and pleas in virtue of which, if the defence of no partnership is repelled, he conceives he is entitled on other grounds to object to the conclusions of count and reckoning either in whole or in part.

Estoppel by conduct, *mora*, acquiescence, etc.

The right to demand an accounting may be barred by acquiescence (*c*); but this must be very clearly established, and will not be presumed from mere elapse of time, unless this is combined with other circumstances (*d*). Accounts laid before the shareholders of public companies at a general meeting, and approved of, cannot in general be impeached in legal proceedings at the instance of dissenting or absent members, unless when they are sought to be reduced on the head of fraud, essential error, or of something which rendered the meeting or the proceedings which took place thereat legal nullities (*e*). Even where, by statute, a retiring shareholder's liability to creditors of the company has been limited to a certain number of years after his retirement, this has not been deemed a bar to an accounting *inter socios* (*f*).

Defence continued.

A settlement of accounts up to a certain date, or in relation to a certain transaction, is a good defence to an action of accounting

(*a*) *Fraser* v. *Hair*, 1848, 10 D. 1402. See *Harris* v. *Harris*, 3 Ha. 450; *Sanders* v. *King*, 6 Madd. 61; *Somerville* v. *M'Kay*, 16 Ves. 382; *Reade* v. *Woodroofe*, 24 Beav. 421; *Blackly* v. *Rymer*, 4 Drew 248.

(*b*) Lindley 819.

(*c*) *Flowerdew* v. *Laing*, 1843, 5 D. 440. See also *Buchanan* v. *Lennox*, 1838, 16 S. 824.

(*d*) *Lister* v. *Sutor*, 1811, aff. 1815, 6 Pat. App. 78; *M'Laren* or *Law*, *etc.*, v. *Liddell's Trs.*, 1860, 22 D. 373.

(*e*) *Ex parte Bignold*, 22 Beav. 165; *Kent* v. *Jackson*, 2 De G. Mac. and G. 49; *Stupart* v. *Arrowsmith*, 3 Sm. and G. 176.

(*f*) *Gouthwaite's* case, 3 Mac. and G. 187.

pro tanto (*a*). The settlement must be proved *scripto;* but it has been held in England, that proof of acquiescence will supply the want of signature (*b*). Mere transmission of the proposed settlement or account, though unobjected to, is, however, no evidence of acquiescence (*c*). When a settlement has *de facto* taken place, the mere discovery of an *error calculi* will not entitle the account to be opened up *in toto*, especially after the lapse of time (*d*), unless the mistake is one which affects the whole; but where fraud is established in any item, the whole account will be opened up (*e*), whatever time may have elapsed (*f*). Where a regular settlement or discharge has been executed, conclusions of reduction must be conjoined with those of count and reckoning (*g*). Payment, even when admitted, is no defence to an action for accounting, for the object of the action is to ascertain the amount due (*h*). And on the other hand, the existence of an agreement to settle on certain terms is not necessarily a complete defence; for if performance within a given time was a condition of the terms being accepted, the right to force an accounting will revive if the condition has not been purified (*i*). If the agreement is binding, it ought to be libelled, and the action should be for payment or performance.

Decree-arbitral.

A decree-arbitral is a good defence to an action of accounting, provided it apply to and be exhaustive of the conclusions of the summons (*k*). It has been held by the English Equity Courts, that an agreement to refer to arbitration forms no bar to a judicial

(*a*) *Pollock, Gilmour, and Co.* v. *Ritchie*, 1851, 13 D. 640; *Hunter* v. *Cochrane's Trs.*, 1829, 8 S. 171, and 9 S. 477; *Taylor* v. *Shaw*, 2 Sim. and Stu. 12; *Endo* v. *Caleham*, You. 306.

(*b*) *Morris* v. *Harrison*, Colles. 157; *Willis* v. *Jernegan*, 2 Atk. 252; but see *Walker* v. *Consett*, Forrest 157.

(*c*) *Irvine* v. *Young*, 1 Sim. and Stu. 333; *Clements* v. *Bowes*, 1 Drew 692.

(*d*) *Pitt* v. *Cholmondely*, 2 Ves. sen. 565; *Vernon* v. *Vawdry*, 2 Atk. 119.

(*e*) *Wharton* v. *May*, 5 Ves. 68; *Allfrey* v. *Allfrey*, 1 Mac. and G. 87; *Clarke* v. *Tipping*, 9 Beav. 284.

(*f*) *Bowmont* v. *Boultbee*, 5 Ves. 68; *Stainton* v. *Carron Co.*, 24 Beav. 346.

(*g*) See *Fowler* v. *Wyatt*, 24 Beav. 232; *Parker* v. *Bloxam*, 20 Beav. 295; *Wedderburn*, 2 Keen 722; *Millar* v. *Craig*, 6 Beav. 433.

(*h*) See *Brown* v. *Perkins*, 1 Ha. 564.

(*i*) Previous case.

(*k*) *Tittenson* v. *Peat*, 3 Atk. 529; *Routh* v. *Peach*, 2 Anst. 519; *Farrington* v. *Chute*, 1 Vern. 72; *Spencer* v. *Spencer*, 2 Y. and J. 249.

accounting (*a*); it is very doubtful if this is law in Scotland, at least where an arbiter has been named (*b*).

Period over which accounting should extend.

The period over which the right to accounting extends, is ordinarily from the commencement of the partnership relation down to the time when the action is raised, or until dissolution, if that event has already taken place. Generally speaking, an incoming partner has no right to an accounting beyond the time of his entrance; because he has no right to share profits which accrued before he became a partner (*c*). Both these rules may, however, be altered by circumstances. If settlements or discharges have taken place up to a certain time, this will bar all inquiry previous to that period; and it is quite possible that an agreement may have been made with an incoming partner, in respect of which he is entitled to an examination of the partnership accounts prior to the date of his entry,—as, for example, when he has undertaken liability for debts previously contracted.

Statutory provisions.

Companies formed by special act, royal charter, or registration, contain provisions in their respective instruments of formation, which, taken in connection with the general Acts, regulate the modes in which the members are entitled to enforce the right of accounting against the concern, and serve to protect their interests from being sacrificed by carelessness or impropriety of conduct on the part of the officials in dealing with property of the company.

8 and 9 Vict. c. 17.

The provisions of the Companies' Clauses Consolidation (Scotland) Act in relation to these matters are as follows:—The directors are required to keep full and true accounts of receipts and expenditure (sec. 118). The books must be balanced at the prescribed periods, and if none be prescribed, fourteen days at least before each ordinary meeting. A balance-sheet must also be made up, exhibiting the stock, credits, and property of every kind belonging to the company, the debts due at the date of making the balance-sheet, and a distinct view of the profit and loss during the preceding half-year. This balance-sheet must be examined by the directors and

(*a*) See *Agar* v. *Macklew*, 2 Sim. and Stu. 418; *Thompson* v. *Charnock*, 8 T. R. 139; *Michell* v. *Harris*, 4 Bro. C. C. 311; *Street* v. *Rigby*, 6 Ves. 814.

(*b*) Bell on Arbitration 20. See *per* Lord Justice-Clerk Hope in *Hawkins* v. *Wedderburn*, 1842, 4 D. 944; *Macdonald* v. *Macdonald*, 1829, 7 S. 765; *Stewart* v. *Lang's Trs.*, 1839, 2 D. 167.

(*c*) *Gordon* v. *Rutherford*, T. and R. 373.

signed by the chairman previous to each ordinary meeting (sec. 119). The books so balanced and the balance-sheet must for the prescribed period, and otherwise for fourteen days previous to each ordinary meeting, lie open for inspection of members at the company's principal office or place of business. At other times a written order is required to allow shareholders to inspect (sec. 120). The balance-sheet, together with the auditor's report thereon, must be produced at the ordinary meeting (secs. 121, 109, and 111). The directors must appoint a book-keeper, charged with the special duty of entering the company accounts in books provided for the purpose; and he is bound, under heavy penalties, to permit any shareholder to inspect such books, and to take copies or extracts, at any reasonable time during the prescribed periods, or otherwise one fortnight before and one month after each ordinary meeting (sec. 122).

Act 1862.

If Table A be adopted as the articles of association, companies under the Act 1862 will be furnished with a set of regulations very similar to, though perhaps more perfect than, the foregoing. They are as follows:—

Books and accounts.

Inspection by members.

The directors must cause true accounts to be kept (1) of the company's stock-in-trade; (2) of the income and expenditure; and (3) of the credits and liabilities of the company. The books of accounts must lie at the company's registered office; and, subject to such reasonable provisions and restrictions as may be imposed by the company in general meeting, they must be open to the inspection of the members during business hours (No. 78). Once a year at least the directors must lay before a general meeting a statement of the income and expenditure, made up to a date not more than three months before the meeting (No. 79). This statement must be arranged under convenient heads, and must show the amount of gross income, distinguished by its sources, and the amount of gross expenditure, distinguishing the different kinds of items. The year's expenditure must be fairly charged against the year's income, so as to bring out a clear balance of profit and loss; and where any item of expenditure which ought properly to be distributed over several years has been incurred in one year, the whole of such item must be stated, with the reasons why it ought so to be distributed (No. 80). A balance-sheet of the property and liabilities of the company, as nearly as possible in the form annexed to the

table, must be made out every year, and laid before a general meeting (No. 81); and a printed copy must also be served on every member seven days before such meeting (No. 82).

Still further to secure the interests of the members, the table makes the following provisions for the appointment and duties of auditors:—The first auditors are appointed by the directors; their successors by the company at their ordinary annual general meeting (Nos. 84–87). The auditors may be members, provided they are not directors or other officials, or are interested in transactions with the company (No. 86); and they are capable of re-election on quitting office (No. 89). On the occurrence of a vacancy among the auditors, the directors must forthwith convene a general meeting to supply the same (No. 90). The remuneration of the first auditors is fixed by the directors; that of their successors by the company in general meeting (No. 88). If no election of auditors is made as directed above, the Board of Trade may, on the application of five members, appoint an auditor for the current year, and fix his remuneration (No. 91). Every auditor must be furnished with a copy of the balance-sheet, which he is to examine, with the relative accounts and vouchers (No. 92). Every auditor must likewise be supplied with a list of all the company books, and has access to them and the accounts at all reasonable times. He may employ professional assistance, at the company's expense, to aid him in the investigation of the accounts; and he may examine any director or officer in relation thereto (No. 93). The auditors must make a report to the members upon the balance-sheet and accounts, stating whether in their opinion the balance-sheet exhibits a true and correct view of the company affairs, and contains the particulars required by the regulations; and whether, if they have found it desirable to examine the directors or other officers, they have received the required information in a satisfactory manner. This report must be read, together with that of the directors, at the ordinary meeting (No. 94). This examination of the accounts must be made, and the correctness of the balance-sheet ascertained, by one or more of the auditors, at least once in every year (No. 83). If one auditor only is appointed, all these provisions are held to apply to him (No. 85).

Auditors.

CHAPTER VII.

CONTRIBUTION AND INDEMNITY (*a*).

UNDER this heading it is proposed to consider the obligation *inter socios* which lies upon all the partners to contribute proportionally towards liquidation of the debts and making up the losses incurred by the company; the cases in which a partner's claims against the company suffer abatement proportionably to his own liability to contribution; and the right which a partner has to be indemnified by the company for losses sustained or obligations incurred by him on its account.

I. LIABILITY OF THE PARTNERS TO CONTRIBUTE RATEABLY TOWARDS THE LOSSES AND DEBTS OF THE FIRM.

Obligation to contribute.

In the absence of special stipulations to the contrary, all the partners are bound to contribute towards the losses and debts of the company in proportion to the interest or share held by them respectively in the concern: *i.e.*, if the right to share profits be equal, so also will be the liability to contribution; and if some have a right to a larger share of profits than the others, the liability to contribution will be exactly proportioned in the same ratio (*b*). This rule may, however, be modified by special agreement.

(*a*) The word originally selected was 'Relief;' but Indemnity was afterwards substituted, because it is doubtful whether Relief bears a meaning co-extensive with the subject, because Indemnity is generally used by the Legislature, and because it seems most undesirable to perpetuate a difference in the phraseology of English and Scottish law where the meaning is the same.

(*b*) *MacAllister* v. *Alexander*, 1837, 15 S. 1061, aff. 1839, M'L. and Rob. 353. See *Aytoun*, 1844, 6 D. 1409; *Orr and Co.* v. *Pollock*, 1840, 2 D. 1092; *Gray* v. *Douglas, Heron, and Co.*, aff. May 10, 1779, 6 Pat. App. (Sup.) 800: *Wilson* v. *Bruce*, 1853, 16 D. 171;

Case of *quasi* partners.

It must be observed that these remarks apply only to partners in the proper sense of the word. Persons who are liable to be sued as if they were partners, and who are generally though improperly termed *quasi* partners, or partners as regards the public, are not liable as such to contribute in a question *inter socios* (*a*). If they incur any such liability, it is not in consequence of their *quasi* partnership, but by reason of some other agreement between them and the *socii*.

For what debts contribution is due.

Partners or their representatives are liable to be made contributories for such debts or claims only as they could have been compelled to pay as at the date when they were contracted, unless liability has been incurred by subsequent conduct or adoption (*b*). Thus, where a partner who had retired, but did not advertise out, was called upon to pay a debt afterwards contracted by the company, it was held that he was not entitled to relief against others who had previously or at the same time retired, and had advertised out, but only against such as were *de facto* partners at the time the debt was contracted (*c*). If, again, a partner or his representatives have, by delegation or otherwise, been discharged *inter socios*, no claim for contribution can be maintained against them (*d*). But where, after debts had been contracted by a firm of two partners, four others were assumed, and the new firm had plainly adopted the debts of the old, the four new partners were found liable in contribution for the original debts (*e*). And where a partner sold his shares to a third party, whom, however, the company did not accept as obligant in his room, he was still found liable to be made a contributory for company debts in a question *inter socios* (*f*).

Action for contribution.

An action for contribution should be libelled as such; and it has been found that an action for calls *ex contractu* cannot be afterwards insisted in as an action of contribution (*g*).

Douglas, Heron, etc., 1800, 2 Bell's Com. 647, n. 3.

(*a*) *Geddes* v. *Wallace*, 1816, as revd. 1820, 6 Pat. App. 643.

(*b*) *Martin* v. *Hunter*, 1835, 7 W. and S. 574.

(*c*) *Wright* v. *Gardner's Trs.*, 1831, 9 S. 721.

(*d*) *Lindesay* v. *Inglis' Trs.*, 1832, 11 S. 181. See also *Hoskins* v. *Christie*, 1845, 8 D. 167; *Craig* v. *Douglas, Heron, and Co.*, 1781, 2 Pat. App. 575.

(*e*) *Mercer* v. *Peddie*, 1832, 10 S. 405; and see *M'Keand* v. *Laird*, 1861, 23 D. 846; *Drummond* v. *Holliday*, 1831, 9 S. 284.

(*f*) *Wilson* v. *Bruce*, 1853, 16 D. 171.

(*g*) *Watson* v. *Ayrshire Iron Co.*, 1859, 22 D. 167.

II. CASES IN WHICH A PARTNER'S CLAIMS AGAINST THE COMPANY SUFFER ABATEMENT PROPORTIONABLY TO HIS OWN LIABILITY TO CONTRIBUTION.

General rules.

As a partnership is a *quasi* person, it may become the debtor of one of its own partners. When this takes place, the question arises, whether the partner creditor is entitled to recover the whole of his debt against the company, or whether his claim must suffer an abatement proportioned to his own share in the concern. The decisions on this subject are few and unsatisfactory, but upon the whole the following rules would seem to be in accordance with equity and legal principle:—1. If, after extinction of all subsisting debts due to the public, the company possess capital or property, the partner creditor will be entitled to payment in full out of such assets before any division of profits can be made (*a*). But (2) if, in consequence of there being no company assets, or not a sufficient amount, after payment of the public creditors, to meet the partner's debt, he is obliged to proceed against the other partners as contributories, it would seem that he can only demand payment of his claim, or the balance thereof remaining due, under deduction of what (if the creditor had been a third party) he must have contributed as his own share (*b*). The reason of this becomes more apparent, if we consider the case of a partner purchasing up a debt owing by the concern to a public creditor. Here, if the concern possessed no funds to meet the demand of the public creditor, every one of the partners would have to contribute rateably towards its liquidation. Now, the fact that one of the partners purchases up the debt cannot relieve him of his liability to contribute with the rest; and therefore he can only demand payment from his fellows of the claim under deduction of such a proportion as, if it had still remained payable to a third party, he would have been bound to contribute.

(*a*) 2 Bell's Com. 646.

(*b*) *Malcolm* v. *West Lothian Ra. Co.*, 1835, 13 S. 887. See *Turner* v. *Mollison*, 1833, 11 S. 669.

III. OF THE RIGHT WHICH A PARTNER HAS TO BE INDEMNIFIED BY THE COMPANY FOR LOSSES SUSTAINED OR OBLIGATIONS INCURRED BY HIM ON ITS ACCOUNT.

This right explained by the doctrines of agency and guarantee.

The nature of this right will be best understood, and the questions to which it gives rise will be most satisfactorily solved, by keeping steadily in view the principles of agency and guarantee, of which, as we have already seen, the law of partnership is in many respects only a special adaptation. According to the law of Scotland, partners are the agents and guarantees of the firm; according to the law of England, they are the agents and guarantees of each other. In so far as the present branch of the subject is concerned, this amounts to a mere difference of statement. The legal principles underlying the two *formulæ* are substantially the same, and yield apparently the same practical results; so that the English precedents and authorities seem entitled to the same weight as our own.

General rules.

The principles of agency and guarantee, when applied to questions arising *inter socios*, produce the following two general rules:—

1. Every partner is entitled to be indemnified by the firm for all losses incurred by him while acting *bona fide* for the concern within the sphere of his agency.

2. Every partner is entitled to indemnity against the firm for such payments as he has been compelled to make to third parties in consequence of company obligations.

These general rules will require some consideration.

Indemnity only claimable for obligations, losses, etc., sustained *bona fide* and within sphere of agency.

To entitle a partner to indemnity against the company for obligations, debts, or losses incurred, and for advances or outlays made by him on its behalf, it is necessary to show that he acted in *bona fide* and within the sphere of his agency; for this is necessary to entitle an agent to indemnity from his principal (*a*). Hence probable advantage, or even the apparent necessity of doing certain things to save the concern from ruin, will not always be sufficient

(*a*) Story on Agency, s. 335; Smith's Merc. Law 130; *Gleadow* v. *Hull Glass Co.*, 13 E. Jur. 1020, V. C. E.; *Sedgwick's* case, 2 E. Jur. N. S. 949, V. C. W.; *Brown* v. *Gibbins*, 5 Bro. P. C. 491; *Croxton's* case, 5 De G. and S. 432; *Stevenson* v. *Duncan*, 1842, 5 D. 167; *Keith* v. *Penn*, 1840, 2 D. 633.

to entitle a partner to indemnity (*a*); for a principal cannot be compelled to pay for advantages which his agent has chosen to secure for him without his authority (*b*). But it must be observed that the agency of a partner is implied as well as specific; and therefore while a partner will not be entitled to relief in relation to such acts as he was prohibited from doing, however advantageous or necessary they might seem (*c*), his implied agency will receive a liberal construction when it has been exercised with ordinary discretion and in perfect good faith. Thus, if a partner contract for goods on behalf of the firm, but make the contract so that he alone can be sued upon it, he will be entitled to indemnity against the firm if the contract were within his agency (*d*). And he will also be entitled to indemnity for the expenses of defending an action brought against him on such contract, if he defended with the knowledge and consent of the firm (*e*). But if a partner act as for the company plainly beyond the limits of his agency, the case becomes very different. Here, as we have already seen (*f*), if the party with whom he transacted knew that the transaction exceeded the agency, it does not bind the company at all. But if the company is bound in consequence of the party with whom the transaction took place being ignorant of its exceeding the bounds of the partner's agency, the latter is himself liable to relieve the company. This is a consequence of the principles of agency (*g*). Of course, if the company homologate the partner's conduct, as by taking the benefit of his unauthorized acts, they will be bound to indemnify him (*h*). All such questions must be solved by having regard to the whole circumstances of the particular case; and, therefore, when a partner makes a claim for reimbursement or indemnity against the company, he ought to make his averments very specifically and in detail (*i*).

(*a*) *Hawtayne* v. *Bourne*, 7 M. and W. 595; *Ricketts* v. *Bennet*, 4 C. B. 686; *Dickinson* v. *Valpy*, 10 B. and C. 128, 3 Ross Lc. Ca. 561; *Edmiston* v. *Wright*, 1 Camp. 88.

(*b*) *Stokes* v. *Lewis*, 1 T. R. 20; *Child* v. *Morley*, 8 T. R. 610.

(*c*) *Thornton* v. *Proctor*, 1 Anstr. 94.

(*d*) *Gleadow* v. *Hull Glass Co.*, 13 E. Jur. 1020, V. C. E.; *Sedgwick's* case, 2 E. Jur. N. S. 949, V. C. W.

(*e*) *Brown* v. *Gibbins*, 5 Bro. P. C. 491; *Croxton's* case, 5 De G. and S. 432.

(*f*) See p. 245 *et seq.*

(*g*) *Child* v. *Morley*, 8 T. R. 610; *Stokes* v. *Lewis*, 1 T. R. 20. See Lindley 629, and *Edmiston* v. *Wright*, 1 Camp. 88.

(*h*) See Story on Agency, s. 250.

(*i*) *Stainton* v. *Carron Co.*, 24

Directors sometimes entitled to indemnity, when partners would not be so.

The same rules are generally applicable where managers or directors seek indemnity from the company for losses sustained or obligations undertaken on its account. But it must be observed, that in some cases these officials will be entitled to indemnity from the company where a partner would have no such claim against the firm. The reason of this difference, and the cases in which it is likely to have place, will appear from the following considerations. A partner, as such, is not charged with the entire responsibility of management, except in very peculiar circumstances. This he shares with his copartners, with whom he ought to consult in all matters of importance. If, therefore, he undertakes personal obligations on account of the firm, without the knowledge and approval of his copartners, his right to relief from them will, in a great measure, depend on their having subsequently adopted the transaction. To the board of directors, on the other hand, the whole management of the company is entrusted; and their only mode of taking the instructions of the shareholders is by calling a general meeting,—a proceeding necessarily involving a considerable elapse of time. Yet such are the exigencies to which all mercantile companies are liable, that prompt and decisive action is often the only means of averting serious losses or absolute ruin; and unless the board of directors were entrusted with a discretionary power of action greatly more extensive than that confided to a partner, the whole concern might be involved in irretrievable disaster before a general meeting could be even assembled (*a*). It is for this very reason, indeed, among others, that companies with a large and fluctuating membership are managed, not by the partners, but by managers or boards of directors. These considerations seem therefore to lead to the conclusion, that whenever directors or other managers make advances or incur obligations for the company for purposes within its sphere of action, they are entitled to indemnity, though they have done so without special authority, and even in violation of regulations intended to be observed in ordinary circumstances, provided they can justify their conduct by what seemed to be the exigencies of

Beav. 346; *East India Co.* v. *Blake*, Finch. 117; *York and North Midland Ra. Co.* v. *Hudson*, 16 Beav. 485.

(*a*) *Fleming* v. *Campbell*, 1845, 7 D. 935; *Maxton* v. *Muir*, 1845, 7 D. 1006; *Nat. Ex. Co. of Glasgow*, 1849, 11 D. 571; *Blackburn* v. *Stewart*, 1851, 13 D. 1243.

the time. Thus, where directors borrowed money on their own security to preserve mines belonging to a mining company from rapid deterioration and destruction, and afterwards repaid the same, they were found entitled to reimbursement from the company, though they had no power to borrow money on the credit of the company, and though it was admitted that the company would not have been bound to repay the money in a question with the public creditor (*a*). And, for the same reason, where, by the deed of settlement, it was provided that if additional funds were required, they should be raised by increasing the capital, or by borrowing on mortgage of the company's real property, and the directors notwithstanding borrowed the necessary sums from a bank, as required from time to time, they were found entitled to charge these advances against the company, although this rendered each shareholder liable to a considerable degree beyond his subscribed share (*b*). In *Baker's* case, 1 Dr. and Sm. 55, V.-C. Kindersley held, that though the director of a company was not entitled to stand as creditor against the company on a debenture issued to him by the company, because the contract wanted confirmation, still, that if he could show that the money had been duly applied in carrying on the business of the company, he should be entitled to recover it as an ordinary debt. The same view was taken in two subsequent cases (*c*). In these and similar cases the principle is, that directors being necessarily invested with greater discretionary powers than ordinary partners, are not to be subjected in personal loss when acting *bona fide* and to the best of their ability for the common interest.

But are never entitled to indemnity where they travel out of the line of business.

But, on the other hand, directors are not entitled to indemnity from the shareholders where they plainly contravene express conditions of the contract of association, or travel out of the scope of the company's line of business. Hence, where it formed a condition of the contract that no more than a certain fixed sum should be expended, and the directors thought fit to expend a much larger sum, it was held that they had no claim of relief against the share-

(*a*) *German Mining Co.'s* case, 4 De G. M. and G. 19. See also *Houstoun* v. *Montgomerie*, 1821, 1 S. 179; *M'Alister* (*Caled. Dairy Co.*) v. *Alexander*, 1843, 5 D. 580.

(*b*) *Ex parte Bignold*, 22 Beav. 143.

(*c*) *Troup's* case, 29 Beav. 353; *Hoare's* case, 30 Beav. 225.

holders *quoad* the excess (*a*). And where directors charged with the winding up of a company chose to expend considerable sums in supporting a public bill in Parliament for the better winding up of companies in general, they were found to have no claim against the company for such expenses, as the purpose was plainly beyond the sphere of their agency (*b*). Again, where the managing committee of a benefit society thought proper to purchase land, and borrow money to pay for it, it was found that they had no claim for reimbursement against the society, as purchasing land formed no part of its purposes (*c*).

Homologation.

When partners act plainly beyond the limits of their agency, or even in contravention of an express provision, they will nevertheless be entitled to contribution, if their proceedings have afterwards been approved of or homologated by the company; and ratification may be presumed by the company taking the benefit of such proceedings, or even by their silence (*d*). Hence, when the company do not intend to adopt the unauthorized act, they should at once object (*e*). The same rules apply as between directors and their companies (*f*).

Illegal acts.

Illegal acts done by a partner will entitle him to no indemnity against the firm; for it cannot be presumed that such acts were either within the intended scope of the undertaking, or that they were approved of by the firm (*g*). If the purposes for which the company was formed were illegal, the case is all the stronger; for as the concern was *ab initio* contrary to law, the law will give no aid to work out its transactions or their consequences (*h*).

(*a*) *Gillan* v. *Morrison*, 1 De G. and S. 421; *Worcester Corn Exch. Co.'s* case, 3 De G. M. and G. 180.

(*b*) *Cropper's* case, 1 De G. M. and G. 147.

(*c*) *Kent Benefit Building Soc.*, 1 Dr. and Sm. 417. See also *Selwyn* v. *Harrison*, 2 J. and H. 334.

(*d*) See Story on Agency, c. vi.; *ex parte Chippendale*, 4 De G. Mac. and G. 19; *ex parte Bignold*, 22 Beav. 143 and 165.

(*e*) *Cragg* v. *Ford*, 1 Y. and C. C. C. 280.

(*f*) See *M'Alister* v. *Alexander*, 1843, 5 D. 580; *Gillan* v. *Morrison*, 1 De G. and S. 421; *re Worcester Corn Ex. Co.*, 3 De G. Mac. and G. 180; *re Cropper*, 1 De G. Mac. and G. 147; *ex parte Chippendale*, and *ex parte Bignold*, *supra*.

(*g*) See *Finlayson* v. *Braidbar Quarry Co.*, 1864, 2 Macph. 1297.

(*h*) *Gibson* v. *Stewart*, 1835, 14 S. 166, 1 Rob. 260; *Gibson* v. *Stewart*, 1828, 6 S. 733, aff. 1 Rob. 260; *Fraser* v. *Hill*, 1852, 14 D. 335. See *Gordon* v. *Howden*, 1843, 5 D. 698; revd. 1845, 12 Cl. and Fin. 237, 4 Bell's App. 254.

When the partnership is not illegal, but where one of the partners is subjected in the penalties or consequences of an illegal act committed by one or more of his copartners without his privity, he will be entitled to indemnity against the wrong-doers to the full extent of his loss (*a*). When, as before, the partnership is not contrary to law, but an unlawful act has been done by all the partners in the knowledge of its illegality, and the loss consequent thereon happens to fall on one of their number, it is the general opinion that he has no claim of contribution against his fellows (*b*). The opposite view, though it has some semblance of authority (*c*), would seem objectionable on the mere ground of public policy.

Loans. Loans made by a partner to the firm are, if properly constituted, in the same position as loans made by third parties; for the firm is a *quasi* person, and may assume the character of debtor to its own members (*d*). Loans made by directors to the company, or advances made by them on its behalf, are in a somewhat different position. Directors are special officers partaking of the nature of trustees, and it is not for the interest of the concern that they should stand to it in the relation of creditors. If the loan is one which, if it had not been made by the directors, must have been obtained from strangers, it will entitle them to reimbursement (*e*); yet, as the transaction is open to suspicion, authority should always be obtained from the shareholders before it is entered into (*f*).

Debts. When a partner is compelled to pay a debt constituted against the firm, he is always entitled to the benefit of contribution, unless the claim has been fixed against the firm, in consequence of his own improper conduct, as *e.g.* exceeding his agency, or having been guilty of fraud or culpable negligence (*g*). But a partner who

(*a*) *Campbell* v. *Campbell*, 1834, 12 S. 573, 7 Cl. and Fin. 166, 1 Rob. App. 1; *Pearson* v. *Skelton*, 1 M. and W. 504.

(*b*) *A. G.* v. *Wilson*, Cr. and Ph. 1, *per* Lord Cottenham.

(*c*) *Baynard* v. *Woolley*, 20 Beav. 583; *ex parte Longworth*, 1 Johns 465.

(*d*) *Keith* v. *Penn*, 1840, 2 D. 633; *Sturrock* v. *Thoms*, 1851, 13 D. 762.

(*e*) *Ex parte Sedgwick*, 2 E. Jur. N. S. 949; *ex parte Bignold*, 22 Beav. 143.

(*f*) *Bluck* v. *Malalue*, 5 E. Jur. N. S. 1018; compare *Murray's Executors*, 5 De G. Mac. and G. 750; and *Teversham*, 3 De G. and S. 296.

(*g*) *Gordon* v. *Howden*, 1849, 12 D. 253; *Prole* v. *Masterman*, 21 Beav. 61; *M'Owen* v. *Hunter*, 1 Dr. and Wal. 347; *Robinson's Executors*, 6 De G. Mac. and G. 572; *Evans* v. *Yeatherd*, 2 Bing. 133; *Richardson, etc.*, v. *Garin, etc.*, 1853, 15 D. 434.

pays a debt claimed, but not due, has no right to indemnity against the firm (*a*); and where a partner departed from a debt judicially found due to the firm, he was found liable to indemnify his co-partners (*b*).

When losses arise to the firm, in consequence of the conduct of one partner rather than of the others, the contribution will still be equal, unless that which caused the loss is attributable to culpable negligence, or something more than mere error in judgment (*c*). The same rules apply to directors (*d*). Fault of one partner.

It is a principle of the law of partnership, that a partner is not entitled to any remuneration for services rendered to the firm, or for loss of time incurred by him in carrying on the common business (*e*); and a managing partner is in the same position (*f*). No claim of indemnity, therefore, lies against the company on this score. The exceptions are where, after dissolution, the business of the firm is carried on by one of the partners for the benefit of the others or their representatives (*g*), and where an express agreement has been made to give remuneration (*h*). Directors of companies are in the same position, and are entitled to no claim for their services without express agreement, under any pretence whatever (*i*). But partners as well as directors are always entitled to charge the company with expenses *bona fide* laid out or incurred in the conduct of its business (*k*). When by agreement the directors are to receive payment, they are entitled to their fees even if the concern proves a failure (*l*). Services.

(*a*) *Re Webb*, 2 B. Moore 500; *M'Ilreath* v. *Margetson*, 4 Doug. 278. See *Cavan* v. *Mackie*, 1832, 10 S. 550.

(*b*) *Brand* v. *Kennedy*, 1710, Robert. App. 8.

(*c*) *Ex parte Letts and Steer*, 26 L. J. Ch. 455; *Cragg* v. *Ford*, 1 Y. and C. C. C. 280; *Lingard* v. *Bromley*, 1 V. and B. 114.

(*d*) *Evans* v. *Coventry*, *per* V.-C. Kindersley, 2 E. Jur. N. S. 557.

(*e*) *M'Whirter* v. *Guthrie*, 1822, Hume 760, and 1 S. 295; *Beath* v. *Campbell*, as revd. 1826, 2 W. and S. 25; *Hunter* v. *Cochrane's Trs.*, 1831, 9 S. 477, and 5 W. and S. 639.

(*f*) *Hutchison* v. *Smith*, 5 Irish Eq. 117.

(*g*) *Brown* v. *De Tastet*, Jac. 284; *Crawshay* v. *Collins*, 2 Russ. 347; *Gordon* v. *Howden*, 1853, 15 D. 378; *Cameron's Trs.* v. *Cameron*, 1864, 3 Macph. 200.

(*h*) *Berry* v. *Lamb*, 1832, 10 S. 792.

(*i*) *Duncan* v. *Union Canal Co.*, 1831, 9 S. 398; *York and North Midland Ra. Co.* v. *Hudson*, 16 Beav. 485; *Evans* v. *Coventry*, 2 E. Jur. N. S. 557.

(*k*) *Geddes* v. *Hamilton*, 1801, aff. 1805, 4 Pat. App. 657; *Duncan* v. *Union Canal Co.*, *supra*.

(*l*) *Ex parte Johnson*, 27 L. J. Ch. 803.

CHAPTER VIII.

COMPENSATION.

Nature of.

ACCORDING to the law of Scotland, where two parties are mutually debtors and creditors, their claims, if equal, extinguish each other; and if unequal, leave only the balance due. This is called compensation, or set-off. It is founded on, and is indeed nothing else than, a special application of the equitable principle which operates in retention, though here as well as in England it has been to a certain extent regulated by statute (*a*).

General principles of.

Before considering the application of this doctrine between partnerships, their members, and the public debtor or creditor, it is desirable to obtain a distinct conception of the rules by which, in Scotland, its practical operation is regulated. In order to found compensation, it is necessary,—1. That the parties be debtor and creditor each in his own right. Thus an agent cannot set off a debt due to his principal against a debt due by himself as an individual. 2. That the parties be mutually debtors and creditors at the same time; so that it has no place where one has assigned his claim before concourse. 3. That the claims be both liquid and exigible; hence there can be no compensation between a present debt and one that is future, much less contingent.

Does not operate *ipso jure*.

Compensation does not operate *ipso jure*, but must be pleaded by way of defence; yet, when sustained, it operates *retro* to the time of concourse (that is, when both claims first co-existed), and stops the currency of interest from that time downwards. Though, properly speaking, there is no room for compensation while one of the debts is not yet constituted, yet when this can be instantly

(*a*) In Scotland by 1592, c. 41; in England by 2 Geo. II. c. 22, and 8 Geo. II. c. 24.

done by writ or oath of party, or when the delay necessary for constitution by witnesses or otherwise is short and limited, it has been usual to stay procedure in the original action till the counter obligation can be constituted as a set-off. This is peculiarly the case in bankruptcy, where a solvent debtor will not be compelled to make instant payment of a liquid debt, and rank for his own illiquid claim on the bankruptcy assets.

Application of doctrine in partnership.

In applying these rules to claims arising between companies and their debtors or creditors, and the debtors and creditors of their individual partners, questions of no ordinary difficulty have presented themselves; and their solution has, it would seem, been considerably embarrassed from a confusion of thought due to a misapprehension of English decisions, in which the *ratio decidendi* depends on peculiarities of that system from which the law of Scotland is happily free.

English law.

The English common law courts have deemed themselves entitled to recognise the doctrine of compensation, in so far only as it has been enunciated by statute; and even within these limits, they have, as in too many other instances, been greatly fettered by technical rules of pleading. The courts of equity, again, though they profess to apply the principles of this doctrine in conformity with what appears to be the substantial justice of the case, have nevertheless regarded themselves as bound by the peculiar form which obligations in England sometimes assume. It is also very apparent that, in the equity as well as in the law courts, the consequences of not recognising the separate *persona* of the firm have made themselves deeply felt in this as in other departments of partnership law, and have produced results which cannot always be reconciled with the ordinary ideas of justice. It would seem, therefore, that in this branch of the subject the English authorities are not in general to be relied on as trustworthy guides, and that the law of Scotland is only to be ascertained by an attentive study of the decisions which have been given by our own tribunals, so as to extract the principles which they contain, and by working out these principles to their logical results.

Scottish law.

In dealing with such questions as present themselves, when the doctrine of compensation is in Scotland applied to partnerships and unincorporated companies, there is one principle of our legal system which must never be lost sight of. That principle is, that the

company being a separate person, is capable of entering into contracts on its own account, and thereby assuming the relations of debtor and creditor both as regards the public and its own members. The consequences of this principle will now be examined in detail; and we shall endeavour to show in what cases its operation is modified or controlled by other principles which are brought into play from motives of convenience or equity.

Compensation as between two companies.

1. When two companies are mutually indebted, compensation takes place between them in the same way as if they were individuals; and since they are persons distinct from their partners, it makes no difference though some of their members be at one and the same time partners of both companies. It is also of no importance that one or both of the companies are dissolved, provided the debts were contracted prior to dissolution; for it is a rule of law, that the firm always subsists until its assets have been realized and its debts discharged.

Handyside v. *Harwood.*

Hence, where a company consisting of three partners was at the time of its dissolution creditor of another company, and two of the partners, who continued to carry on the business, became in turn debtors to the other company whose estates were sequestrated, it was held that, in an action by the trustee against the two partners for payment of the debt due *by* them, they were entitled to compensate that debt with the debt due *to* them as partners of the first company, the other partner having no longer an interest therein (*a*). In this case compensation took place in reality between two companies, whatever effect the retirement of the third partner may be supposed to have produced. For whether we say that after that event the old company still continued with the loss of one of its partners, or that a new company was formed taking up the claims and liabilities of the old, it is still true that there was a concourse of debit and credit between companies.

Compensation between a company and an individual.

2. When, of the parties mutually indebted, one is a company and the other an individual, compensation will take place as before.

This was found to be the case even where the company carried on two separate businesses under different firms. In *Inglis, Gilchrist, and Co.* v. *Cuthbertson* (*b*), a company consisting of two partners carried on business as bankers in one office and as linen-drapers in

(*a*) *Handyside* v. *Harwood*, 1812, 17 F. C. 29. (*b*) 1809, Hume 122.

another, and kept separate books applicable to each; yet it was found that they were entitled to set off a debt due by them as bankers to a party, against a debt due to them as linen-drapers by the same party. If this had been the case of an individual carrying on two separate trades, the decision would have been law wherever the doctrine of compensation is admitted. The fact of its being the case of a company may serve to show how fully the separate person of the company is recognised in the law of Scotland.

Effect of dissolution.

But it must be observed, that in the general case there is no room for compensation on the head of debts or claims arising out of contracts made with any number of the partners less than the whole, after the dissolution of the company has been properly notified. The reason is, that after that event the company only subsists for the purposes of winding up, and the implied agency to enter into new contracts is withdrawn. The only exception to this would seem to be when the new transaction has been adopted by all the former partners; or where, as we shall afterwards see, the partner to whom the debt has been contracted agrees to set it off against a claim made by his debtor against the company.

Compensation between the company and one of its partners.

3. Compensation has place between debts due to the company by one of its partners, and debts due by the company to that partner.

Examples of this occur when advances have been made between companies and their individual partners, and claims are made for contribution or indemnity, and whenever claims of contribution and indemnity are set off one against the other. See 'Contribution and Indemnity.' It must be observed, however, that, when the company is bankrupt, there can be no compensation between it and its partners; as the claims of the partners only emerge after those of the public creditor have been satisfied.

It may also be stated as a general rule, that there can be no compensation between debts due by one partner to the other, and debts or claims between these partners and the company. Thus, if a company consist of four partners, A., B., C., and D., and A. sue D. for £100 *privato nomine*, this will not be compensated by a debt due by the company to D., or by a debt due by A. to the company. And in like manner, if the company sue B. for contribution, the claim cannot be met by a debt due to B. by another of the partners. Or, again, if B. sue the company for indemnity, or for a share of

profits, or for a loan, the company cannot set off against B.'s claim a debt due by him to another of the partners. Here there is no concourse of debit and credit; for the company being a separate person, there are in all the cases supposed three parties, and no two of them are mutually debtors and creditors of each other.

The difficulty may sometimes be removed by assignation, but this cannot be resorted to in bankruptcy when the effect of the assignment would be to diminish the assets of the company available to its creditors. Compensation may, however, take place in the cases supposed where there are only two partners in the firm, or where, there being more, one partner is creditor of all the others bound conjunctly and severally. But if the company is bankrupt, compensation cannot even in such cases be pleaded.

No compensation between the debts of the company, its partners, and strangers.

As a general rule, there is no room for compensation as to debts in which a company, its partners, and strangers occupy the relative positions of creditors and debtors to each other. Thus, 1. a stranger cannot set off against a debt due by him to the company a private debt due to him by one of its partners as an individual. In such a case there is no *concursus debiti et crediti;* for though a partner is personally liable for a company debt, the company is in no wise responsible for his private obligations. Nor does it make any difference that the partner, who is debtor to the stranger, may happen to be the sole surviving or solvent partner of the concern at the time when the company claim is sued for; for in such a case the partner in question is in truth trustee for all those who have claims on the company, and holds in his person two separate and very distinct characters, viz. that of debtor to the company debtor as a private individual, and that of creditor to the same person as trustee for the company creditors. So that to allow compensation in such a case, would be in fact to allow an illegal preference to one company creditor over all the others. If, however, the concern, of which the partner who is debtor to the stranger is the sole survivor, have no creditors, compensation will have place, because the character of trustee in the surviving partner does not exist (*a*).

No compensation between a partner's debt

2. A partner cannot set off against his private debt a debt due by his creditor to the company. No case, in so far as the author is

(*a*) *Morrison* v. *Hunter*, 1822, 2 S. 62; *Kerr* v. *Scott*, 1823, 2 S. 400; *Thom* v. *North British Bank*, 1850, 13 D. 134.

aware, has hitherto occurred in which this point has been decided; but on the principles given effect to in the decisions last noticed there seems no reason to doubt the accuracy of the proposition. The company, being a separate person, can in no case, except those of delegation or suretyship, be held liable for the private obligations of its members; and *e converso*, a partner cannot be in right of a company claim, unless by transference. There is not, therefore, in this instance any more than in the last, a *concursus debiti et crediti.* Moreover, to allow compensation in the circumstances supposed, might, in the event of the company's bankruptcy, deprive its creditors of one of its assets, thereby reversing the rule of the law of Scotland, that company creditors are entitled to a preference over its partners and their creditors.

and his creditor's debt to the company.

But, on the other hand, there are cases in which compensation has place between companies and the public by reason of private debts due by or to their partners. These cases may be stated as exceptions to the principle laid down at the outset, or rather as consequences of another principle by which the operation of the former is modified and controlled. This latter principle may be stated as follows:—

Cases when this rule does not apply.

Though the company be a separate person, yet as every one of the partners is liable for its obligations *in solidum*, any one of them may at the instance of a creditor be compelled to pay the whole of a debt constituted against the company, or he may step forward with the consent of the company and do so of his own accord. When either of these events takes place, the partner so compelled or offering to make payment may set off against the company debt, which has thus become his own, any constituted claim which he holds as an individual against the company creditor. This principle has accordingly found its exponent in the following rules:—

Principle of these cases.

1. When a company is sued for a debt due by the firm, it may plead compensation on a private debt due by the creditor to one of its partners, and that without any assignation from such partner.

Rule 1.

The first case in which this question was raised for decision was that of *Bogle's Cred.* v. *Ballantyne*, 1793 (*a*). There was some difference of opinion upon the bench, but the majority of the judges ultimately decided in accordance with the rule here stated, and on

(*a*) M. 2581.

the *ratio* indicated above. Since that period several cases have occurred which will be found noted below, and in all of them decisions were given in accordance with this rule, which was regarded as fixed law (*a*). In the late case of *Thomson* v. *Stevenson*, 1855 (*b*), the same doctrine was again affirmed; and the opinion of Lord Curriehill, containing as it does an admirable *resumé* of the arrangement, may here in part be quoted: 'When a pursuer brings action against a company where the partners are liable *singuli in solidum* for all the sums sued for, each is debtor individually for the whole sum. . . . If any individual partner has a debt owing to himself individually, he is entitled to plead compensation, and the company is entitled, with his consent, to insist that it shall be so applied. Assignation is not necessary, but consent of the individual is necessary; and he must concur in the application of his individual debt. But with his concurrence the company is entitled to say, "Our partner, who is individually liable, chooses to pay off our debt in this manner, and we apply his debt in this way." That is the principle upon which the former decisions proceeded.'

Insolvency or dissolution immaterial.

In the application of this rule, it makes no difference whether the company be solvent or insolvent, or whether it be dissolved or still in existence; for in all these cases the partner is equally liable to be proceeded against for the whole company debt (*c*).

Consent of partner necessary;

It will be observed, however, that it is not in the power of the company to apply a debt due to one of its partners in this manner without his consent; for so long as he is not proceeded against as an individual liable *in solidum* for the company debt, he may have good reasons for objecting to his own private claims being applied in this manner. This is plainly stated in the opinion of Lord Curriehill quoted above, and also in the opinions of the judges of the Second Division in the late case of *Raleigh* v. *Hughson and Dobson* (*d*).

and also that of the company.

In like manner, it seems equitable that when the company is ready and willing to make payment from its own funds, a partner should not have it in his power to adopt this mode of settling his

(*a*) *Scott* v. *Hall and Bisset*, 1809, 15 F. C. 311; *Salmon* v. *Padon and Vannan*, 1824, 3 S. 285; *Wood, James, and Wood* v. *Downie*, 1836, 15 S. 12. See also *Russell* v. *M'Nab*, 1824, 3 S. 41; *Hill* v. *Lindsay*, 1847, 10 D. 78, and Bell's Com. vol. ii. p. 666 *et seq.*

(*b*) 17 D. 739.

(*c*) Same case.

(*d*) 1861, 23 D. 352.

private claims without their consent. In many cases this would be most undesirable, as it might afterwards give rise to much unnecessary embarrassment in settling accounts between the partner and the company (*a*).

2. When a partner sues a company creditor for a private debt, he may be met by setting off the debt due by the company to the creditor. Rule 2.

This rule is another consequence of the principle we are now considering, and proceeds on the following *ratio*, that since the partner is liable *in solidum* for the company debt to his own debtor, the latter may at once create the necessary concourse by using diligence against him as an individual (*b*).

No compensation after dissolution without consent of former partners.

After a company has been dissolved, and the dissolution has been duly published, the *quasi persona* still subsists until the company be fully wound up; but the agency to bind the company formerly possessed by the partners ceases, and therefore new contracts made with one of the former partners are not contracts made with the company, but with the partner as an individual. The consequence of this is, that no compensation can take place without the consent of all the former partners between a debt due to the dissolved company and a debt subsequently contracted by one of its former partners as if on its account (*c*).

Exceptions.

When a company is dissolved, but not bankrupt, and a debt due the concern may be apportioned among the former partners, any one of them may compensate a debt due by himself privately with so much of the company claim as falls to his own share (*d*). Here, however, there is not, properly speaking, a set-off between a debt due the company and the private debt of one of its partners, but between such partner's private debt and his ascertained share of the partnership estate.

Rights centreing in a single individual.

When by death, retirement, or otherwise, the rights and obligations of a company have come to centre in a single individual in his private character, and not as a trustee for creditors of the company, or for the representatives of his former partners, compensation may

(*a*) See *Hotchkis* v. *Royal Bank of Scotland*, 1797, M. 2673, aff. 3 Paton's App. 618.

(*b*) *Bogle* v. *Ballantyne*, 1793, M. 2581.

(*c*) *Anderson* v. *Rutherfurd*, 1835, 13 S. 488.

(*d*) *Oswald's Trs.* v. *Dickson*, 1833, 12 S. 156; *Heggie* v. *Heggie*, 1858, 21 D. 31.

take place between debts due to or by the company, and those in which he is individually debtor or creditor. Here no injustice can arise to any one; for the question no longer lies between a third party and one of the partners of a company, but between two private individuals who are mutually debtors and creditors of each other.

This point has never, it is believed, arisen for decision in any reported Scotch case; but on principle, the solution given appears to admit of no dubiety, and it has been so decided repeatedly in English cases which presented no elements peculiar to that system (*a*).

Case where partner has been dealt with as an individual.

It has already been pointed out, that a partner may become debtor or creditor in a transaction in which, though he really acted for the company, the opposite party dealt with him as an individual. When this takes place, compensation may be pleaded between the two contracting parties, altogether irrespective of the company. This proposition is a necessary consequence of the principle, that it is competent for any man to contract with another as a principal and entirely disregard his character of agent. It has been expressly affirmed in several English cases, and is indeed assumed in the Scotch case of *Anderson* v. *Rutherford*, before referred to (*b*).

If, on the other hand, the party who contracted with the partner was aware that he was acting as agent, and transacted with him in that capacity, no concourse of debit and credit between them individually will avail against the claims of the company (*c*).

(*a*) See *Fletcher* v. *Dyche*, 2 T. R. 32; *Owen* v. *Wilkinson*, 5 C. R. N. S. 526.

(*b*) 13 S. 488. See also *James* v. *Downie*, 1836, 15 S. 12.

(*c*) See *James* v. *Downie*, *supra*; and *Liddell and Co.* v. *Young and Son*, 1852, 14 D. 647; *Lumsden* v. *Allan*, 1823, 2 S. 503; *Dixon*, 2 Barn. and Ald. 310; *Dobson* v. *Christie*, 1835, 13 S. 582. See as to what constitutes *scienter*, *Fleming* v. *Findlay and Co.*, 1832, 10 S. 739.

CHAPTER IX.

RETENTION OR LIEN.

Nature of.

IT is a principle of equity, that no one ought to be compelled to part with the property of another, while that other retains property belonging to him. This principle, working in the English and Scottish systems of jurisprudence, has in the former evolved the doctrine of lien, and in the latter that of retention. These doctrines originally presented points of considerable difference in extent and mode of operation; but gradually converging as each became more full and determined, they may now for practical purposes be said to coincide (*a*).

Difference between retention and compensation.

Retention or lien differs from compensation in several important respects. Retention merely entitles the possessor to withhold payment or delivery till the counter demand is satisfied; compensation operates an extinction of the mutual debts: retention gives security for debts, even though they may be future, contingent, or illiquid; compensation applies merely between debts due and liquid. Retention, moreover, ceases to operate as soon as possession is lost, provided this be not due to force or fraud. Retention may be either general or special. As a rule, a party can only retain effects in security of a debt or obligation with which they are immediately or directly connected, as a ship for the value of repairs made upon it; but in some cases there is a more general right of retention, as for a general balance of accounts, and over articles of the same kind transmitted in the general course of dealing (*b*).

Retention as between companies and the public.

As a general rule, it may be stated that retention has place between the persons of a private firm, of a company, or of a cor-

(*a*) More's Stair, cxxxi., 1 Lectures 402; Bell's Prin. s. 1431.

(*b*) See Bell's Prin., *supra*, and Bell's Dict. and Dig. 721.

poration, and the public, in the same way as between two individuals. But inasmuch as these artificial persons can only transact with the public by means of agents who may be either their partners, office-bearers, or others specially employed for the purpose, questions of an embarrassing nature frequently present themselves. The solution of such questions is to be found in the principles of agency; and when properly stated with reference to these principles, they will be found to present little difficulty.

Cases where retention has place.

If the company's agent, be he partner, director, or a stranger specially employed, contract with one of the public as a principal, or, in other words, conceal his agency; or if the other party choose to contract with the agent, not in that character, but on his individual credit, retention has place between the agent and such party, and the company has no right to interfere in the matter. Thus, where the owner of goods sent them and indorsed the bills of lading to a merchant for sale, who again delivered them to a broker for the same purpose, and the broker *bona fide* made advances to the merchant on their credit, it was held that the broker was entitled to retention of them against the true owner in security of his advances (*a*). So, when a party consigned goods in his own name, without mentioning that they were the property of another for whom he was acting, the consignee was found entitled to retain the goods for debts due by the consignor, although existing prior to the consignment; and he was found not liable to account to the true owner for the proceeds (*b*).

Cases where it is excluded.

But, on the other hand, when the party with whom the transaction takes place has reason to know, either expressly or otherwise, that the person with whom he transacts is truly acting as agent for a company, no right of retention accrues between such party and the agent (*c*).

Stuarts v. *M'Gregor and Co.*

The only case that might seem hostile to the principle here laid down, is that of *Stuarts and Fletcher* v. *M'Gregor and Co.* (*d*).

(*a*) *Ede and Bond* v. *Findlay, Duff, and Co.*, 1818, 19 F. C. 208 and 509.

(*b*) *Johnston* v. *Scott and Son*, 1818, 19 F. C. 561; *Attwood* v. *Kinnear and Sons*, 1832, 10 S. 817.

(*c*) *Stirling and Sons* v. *Duncan and Co.*, 1823, 1 S. App. 389; *M'Call and Co.* v. *Black and Co.*, 1824, 2 S. App. 188. 1 Bell's Com. 485, n. 1. *Farrar and Booth* v. *North British Bank*, 1850, 12 D. 1190; *Liddell and Co.* v. *Young and Son*, 1852, 14 D. 647; *Anderson and Co.* v. *Collier*, 1829, 7 S. 466.

(*d*) 1829, 7 S. 622.

Here the consignee of goods was found not entitled to retain them against their true owners, for advances made by him to the agent who had consigned them; but it must be observed that the advances were not made on the credit of the consigned goods, and had no relation thereto, and the contract was that of deposit, which never grounds retention (*a*).

Case of consignment of goods.

When goods are consigned, it seems doubtful whether any right of retention exists for debts on a general balance previously existing, even where the consignee was in ignorance of the agency. In *Johnston* v. *Scott and Son* (*b*), the Court seem to have held that there was; in *Johnston and Manly* v. *Findlay, Duff, and Co.* (*c*), a contrary view seems to have been taken; while in *Reid* v. *Watson* (*d*) the question was stated to be one of difficulty, and was left undetermined.

Quasi retention between partnerships and their members.

Similar rights exist as between partnerships or companies and their partners or members, to which the names of retention or lien are also given, though they might be more properly designated by the terms *quasi* retention and *quasi* lien.

Since the company may be creditor of one of its partners, it has a lien over his share to that extent (*e*); but this does not exist over shares held *pro indiviso* by persons who are not both debtors (*f*). Since, again, all the partners are trustees of the company property, 1*st*, for the company creditors; 2*d*, for partners who are its creditors; and 3*d*, for the partners themselves in respect of their shares or other beneficial interest in the concern,—it follows, 1*st*, that all the partners, or the company, which is the same thing, have a right to see the company property applied for payment of the company debts, that is to say, have a right akin to that of lien or retention over the company property for this purpose (*g*); and 2*d*, that every partner has a right to have the company property applied in liquidation of his own claims against the concern, after the public creditors have been satisfied; or, in other words, that he

(*a*) Stair i. 13, 9. *Appin's Creditors*, 1760, M. 749. See also *Laurie* v. *Black*, 1831, 10 S. 1.

(*b*) 1818, 19 F. C. 561.

(*c*) 1826, 4 S. 410.

(*d*) 1836, 14 S. 223.

(*e*) *Burns Laurie's Trs.*, 1840, 2 D. 1348; *Houston* v. *Lady Montgomerie*, 1821, 1 S. 179.

(*f*) *Gardners* v. *Royal Bank*, 1815, 18 F. C. 458.

(*g*) *Maccaul* v. *Ramsay*, 1740, M. 14608; *Oswald's Trs.* v. *Dixon*, 1833, 21 S. 156.

has a *quasi* right of retention over the company funds to that extent (*a*).

Extent of this right.

The right of retention enures to a partner in security of his claims against the company over all the company property, in respect that the company is his proper debtor (*b*); but it does not extend to the separate estate of the other partners, so as to render one liable in *solidum*, which would be the case if the company creditor were a stranger, but only against each *pro rata portionis* (*c*). The right is not confined to the partner, but extends to his representatives or assignees, or trustee in bankruptcy (*d*). It lies over the company stock as such, and is therefore not lost by the substitution of new stock for old (*e*); and for the same reason does not attach to what is acquired by those who may continue to carry on the business after a dissolution (*f*). In like manner, it does not apply to subjects of which the company has only the usufruct, for that is not company property (*g*). As the legal or voluntary representatives of a partner acquire this right, so also do they take his interest or share in the company property subject to this *nexus* (*h*). But it does not extend to company property sold by a partner as agent for the firm (*i*).

Available after payment of creditors.

It must be observed that this right competent to a partner, in security of his claims against the company, only becomes available after the creditors of the company have received payment, or at least after a full provision has been made for such payment. Hence a partner who had made advances and undertaken obligations for behoof of the company, was found not entitled on that account to retain the final instalments of his share of the stock; it not being alleged, that if the whole subscribed stock were paid up, it would be sufficient to liquidate the other debts due by the company (*k*).

(*a*) *Maghie* v. *Tait*, 1785, M. 14668. See also *Corrie* v. *Calder*, 1761, M. 14596.

(*b*) *West* v. *Skip*, 1 Ves. 8, 239; *Stocker* v. *Dawson*, 9 Beav. 239; *Skip* v. *Hardwood*, 2 Swanst. 586.

(*c*) *Maghie* v. *Tait*, 1785, M. 14668.

(*d*) *Ibid.* See also *per* Lord Hardwicke in *West* v. *Skip*, 1 Ves. 244; *Skip* v. *Hardwood*, 2 Swanst. 586; *Buckwall* v. *Royston*, Pre. Chan. 285.

(*e*) *West* v. *Skip*, *supra*.

(*f*) *Stocker* v. *Dawson*, 9 Beav. 239.

(*g*) *Cox* v. *Stead*, 1833, 11 S. 672, aff. 1834, 7 W. and S. 497; *ex parte Gemmell*, 3 M. D. and D. 198.

(*h*) *West* v. *Skip*, and *Maghie* v. *Tait*, *supra*.

(*i*) *Langmead's Trs.*, 7 De G. M. and G. 353.

(*k*) *Turner* v. *Maclaren*, 1838, 11 S. 669.

English law.

Much valuable assistance may be obtained from the English decisions in relation to this branch of the subject: some of them have already been referred to, and reference may further be made to Lindley on Partnership, p. 576 *et seq.*, and Collyer on Partnership, p. 77 *et seq.* But in making use of English precedents, it is necessary to keep in mind two respects in which the English law differs in principle from our own, and which are not without their effect in questions of this kind. 1. The law of England does not recognise the separate person of the firm. 2. In bankruptcy, the English rule is to apply the company property in the first place in payment of its creditors, and the separate estate of the partners in payment of their creditors (*a*); whereas, in Scotland, the company creditors are not only preferable over the company estate, but are entitled to rank *pari passu* with the private creditors of the partners over their separate estate (*b*).

(*a*) Lindley 545.
(*b*) Shaw's Bell's Com. 234; and *postea*, 'Bankruptcy.'

CHAPTER X.

GOOD-WILL.

THE good-will of the business forms part of the company property, and is sometimes of great value.

Nature of good-will.

It is not easy to give it a definition which should be of much use in considering questions of partnership; but, generally, it may be taken to mean all benefits or advantages arising out of the business connection. Sometimes it attaches to the persons by whom the business has been made or carried on; sometimes to the stock, premises, or locality.

Must be sold on dissolution.

When a company or firm is dissolved, the general rule appears to be, that, in the absence of special agreement, the good-will of the business must, like other company property, be sold for behoof of all concerned (*a*). To this rule, however, there are exceptions.

Distinction between good-will in professional and mercantile firms.

If weight is to be given to the English authorities, it would appear that a distinction must be made between professional and mercantile firms. In the former, the good-will is almost personal to the partners, and therefore cannot be made the subject of a compulsory sale; for an attorney, a surgeon, or a skilled artisan, cannot be forced into an agreement that he shall not prosecute his business within a certain area. In the latter, the good-will often depends on the fitness of the stock or the premises, or on the possession of a patent; and in such cases it represents a tangible interest which may be valued and sold. This distinction appears founded in reason, and was recognised by Sir John Leach in *Farr* v. *Pearce* (*b*), and *Spicer* v. *James* (*c*).

(*a*) *Wedderburn*, 22 Beav. 104; *MacCormick* v. *M'Cubbin*, July 4, 1822, 1 S. 496; *Marshall* v. *Marshall*, 1816, 19 F. C. 101; *M'Whannell* v. *Dobie*, 1830, 8 S. 914.

(*b*) 3 Madd. 74–78.

(*c*) Rolls M. T. 1830.

Even in proper mercantile firms, when a dissolution takes place, the good-will, in so far as it can be made the subject of sale, will often be found almost inappreciable.

Dissolution does not prevent partners carrying on the same business.

When the partnership is dissolved, any one or more of the partners may, in the absence of a voluntary agreement to the contrary, carry on the business on their own account; and they are quite entitled to make use of all the advantages incidental to their former connection with the partnership (*a*). It has even been held, that, in the case of dissolution by death (*b*), the survivor may make use of the name of the late firm, though it would appear that the executors of the deceased partner have not this right (*c*). However this may be, it seems settled law, that when the good-will of a business has been sold, the seller may recommence a similar business in the immediate neighbourhood of the old premises (*d*); the only restrictions on this right being, that in the case of a firm the sellers shall not assume the old name, or represent themselves as the successors of the former concern.

Mercantile firms.

Even, therefore, in the case of a mercantile firm, the good-will, when a dissolution takes place, will, unless for some voluntary agreement restraining the late partners from prosecuting their business, amount to nothing more than such value as may, in the public mind, attach itself to the possession of the stock, machinery, or premises of the late firm.

Dissolution by death.

When a firm is dissolved by death, it would appear that the good-will, whether it be of real or speculative value, if it is sold at all, must be sold for the behoof of all concerned; that is to say, the surviving partners cannot dispose of it for their own benefit, but must share its proceeds with the representatives of their late partner (*e*).

Retirement.

When a partner retires from a firm, but without a dissolution taking place, he cannot, it should seem, in the absence of express agreement, insist on receiving any consideration from the company

(*a*) *Farr* v. *Pearce*, *supra*; *Davies* v. *Hodgson*, 25 Beav. 177; *Hammond* v. *Douglas*, 5 Ves. 539; *Wedderburn*, *supra*; *Smith* v. *Everett*, 5 E. Jur. N. S. 1332.

(*b*) *Webster*, 3 Swanst. 490.

(*c*) *Lewis* v. *Langdon*, 7 Sim. 421.

(*d*) *Davies* v. *Hodgson*, *supra*; *Churton* v. *Douglas*, 1 Johns. 174; *Curtwell* v. *Lye*, 17 Ves. 335; *Kennedy* v. *Lee*, 3 Mer. 455; *Shakle* v. *Baker*, 14 Ves. 468; *Harrison* v. *Gardner*, 2 Madd. 198.

(*e*) *Smith* v. *Everett*, *supra*; *Wedderburn*; *MacCormick* v. *M'Cubbin*; *Marshall* v. *Marshall*, *supra*.

for his share of the good-will. The company, being a separate *quasi* person, still continues to exist, and retains the good-will as part of its property. The retiring partner has himself to blame if he has left the concern without receiving compensation for this, among other interests, which he thereby resigned. This has been decided in England, though, from the non-recognition of the firm as a separate person, it does not in that system stand upon such an intelligible principle. It has also been decided, that an agreement to take the retiring partner's share at valuation does not entitle him to get his (*a*) share in the good-will valued. But it may be questioned whether this decision can be taken as fixing a general rule. Even when a partner has received a compensation for retiring, this does not necessarily preclude him from starting a new concern, for the purpose of carrying on the same business (*b*).

When, however, it has been arranged that a retiring partner's share in the good-will shall be purchased by the company, regard will be had, in fixing the price, to the length of time such partner was entitled to have continued a member of the firm (*c*).

It is of course always competent for a retiring partner to bind himself that he shall not carry on business in opposition to the firm; and this obligation has in England been held as implied, though not expressed *totidem verbis*, in the articles of partnership (*d*).

English authorities.

Such, it is humbly conceived, may be taken as the fair import of the decisions on the subject of good-will, considered as partnership property; but it cannot be denied that the principles of this branch of partnership law are as yet far from being fixed or definite. Few or no decided cases can be found in the Scotch reports having a distinct bearing on the subject; and the English authorities, it must be admitted, are ambiguous, and even conflicting (*e*).

(*a*) *Hall* v. *Beav.* 139; *Kennedy* v. *Lee*, 3 Mer. 452.

(*b*) *M'Kirdy* v. *Paterson*, 1854, 16 D. 1013.

(*c*) *Austen* v. *Boys*, 24 Beav. 598; aff. 2 De G. and J. 626.

(*d*) *Cooper* v. *Watson*, 3 Dougl. 413. See also *Harrison* v. *Gardner*, 2 Madd. 198.

(*e*) See, on this subject, Coll. 102 *et seq.*, and Lindley 709 *et seq.* Tudor's Le. Ca. 313.

CHAPTER XI.

EXTRAORDINARY PRIVILEGES AND AGGRESSIVE POWERS.

General observations.

Rights of the subject can only be affected by Act of the Legislature.

It is the distinguishing badge as well as the fundamental principle of constitutional government, that every citizen or subject has the full and absolute control of his person and property within the limits defined by the existing laws, and that no alteration can be made on these laws except by the Legislature, from which they originally emanated, and from which they derive their existing force. This principle of constitutional law, which is too well recognised and accepted to require either argument or illustration, appears to have received implicit assent in the earliest annals of the Teutonic races, however much in times of usurpation and political decadence it may have been obscured or forgotten. That it was recognised in Scotland as well as in England, in ages when the constitution was respected, is obvious to the most cursory if unbiassed student of British history; that it did not accord with the maxims of the civil and other foreign systems of law, of which the Scottish lawyers were always too much enamoured, is a proposition that requires no comment; and that it was often set at nought or ignored during the reigns of the later Stuarts, is unfortunately but too well established. At the Revolution, however, and more especially at the Union, it was again restored to its proper place in the constitution, and has ever since received such increasing prominence, that it now permeates the whole body not only of our constitutional but also of our municipal law, and distinguishes the British constitution from the arbitrary rule of a despotism on the one hand, and the fitful movements of a democracy on the other.

Exclusive privileges and aggressive

Exclusive privileges and aggressive powers, monopolies, the power to appropriate private property, that of making bye-laws

powers can therefore be conferred in this manner only.

binding on the public, and of levying rates, together with other privileges of a similar kind, which are often enjoyed by public companies, are all infringements of those rights of the subject which the common law guarantees, and can therefore be conferred in no other way than by an Act of the Legislature.

How Legislature may interfere.

It is not necessary, however, that the Legislature should in every case interfere by special statute. It is enough that it gives authority indirectly, provided its having done so be clearly established. Thus, it may pass general statutes conferring certain privileges on all companies formed for certain purposes, and conforming to certain conditions, as *e.g.* the 27th and 28th Vict. c. 120. Or it may enable the Crown to grant monopolies in certain circumstances, and subject to certain provisions, as in the case of the Patent Acts. But it is observable that aggressive or compulsatory powers are always conferred by special acts.

Exclusive privileges and aggressive powers, etc., cannot be conferred by prerogative.

It has sometimes been supposed that the Crown could in Scotland confer exclusive privileges, and the power of levying rates, by a mere exercise of prerogative; and attempts have been made to trace a difference in this respect between the laws of Scotland and England. When, however, the subject is fairly examined, it becomes difficult to discover any solid foundation for such a doctrine. It is no doubt easy to produce numerous instances in the past history of Scotland where the prerogative has been exerted to confer monopolies, and to invest favoured corporations with the power of imposing bye-laws, and even taxes, on the general public; but the value of such acts as precedents is greatly impaired, when it is considered that they took place prior to the Revolution, and at an era when the rights of the subject were little regarded, and the very principles of the constitution habitually violated. Numerous examples of the same exercise of prerogative occur in England at the same period of the national history; but in both countries they were regarded as grievances, and were even to some extent checked by the Legislature (*a*).

Inference to be drawn.

Now, the natural inference to be drawn from this state of matters appears to be, that in Scotland as well as in England such exertions of prerogative were at all times illegal, and that they ceased in both parts of the United Kingdom as soon as the constitu-

(*a*) 21 James I. c. 3; 1641. c. 76.

tion regained its original purity. But even if this were not so, and if it could be shown that the principles of the old Scottish monarchy were radically different from those of the English constitution, it will hardly be maintained that this distinction survived both the Revolution and the Union, and has continued unabated to the present times. On the contrary, it will probably be admitted by the greatest admirer of Scottish nationality, that the principles of constitutional law are now identical in all parts of the island; and that though a diversity still unhappily exists between the municipal laws of England and Scotland, this diversity does not affect the principles of the constitutional law, but merely the language and machinery in which these principles find expression. Upon the whole, therefore, it may be fairly concluded, that such powers and privileges as we are considering cannot now in Scotland, any more than in England, be conferred otherwise than by legislative action.

Such rights conferred before the Union will not now be rescinded.

It must be observed, however, that when a corporation or other association has continued in the uninterrupted enjoyment of such powers and privileges from a period anterior to the Union down to the present time, they will not be rescinded by the tribunals, though it could be shown that they had been originally conferred by a mere exercise of prerogative. The reason of this is, that it cannot be affirmed with certainty that their creation was an exercise of prerogative altogether inconsistent with the principles of the constitution as it was understood while Scotland remained a separate kingdom; and it must be considered that their enjoyment without challenge for so long a time infers ratification by public consent, and gives them that kind of *quasi* legislative sanction which supports many useful Acts of Sederunt, the legality of whose origin might otherwise admit of question (*a*).

Agreements not to oppose a bill cannot be inferred.

When a bill is brought into Parliament for the purpose of incorporating a company with aggressive powers, or of conferring such powers on a company already formed, it is not uncommon for agreements to be made on the part of parties interested, that they will forbear to give opposition, or will withdraw such opposition as they have already offered, on condition of receiving a pecuniary

(*a*) See, upon this subject generally, *Edin. and Glasg. Ra. Co.* v. *Magistrates of Linlithgow*, 1859, 21 D. 1215; revd. 3 Macq. 691, 21 D. (H. of L.) 15.

consideration. Such agreements have been found to be illegal, and cannot be enforced (*a*).

General principle applicable to construction of aggressive power.

When the Legislature confers exclusive privileges, aggressive powers, or powers interfering in any way with the rights and liberties of the subject, it is moved by considerations of public importance and general utility sufficient to justify the suspension of the common law which such a proceeding involves; and it never confers such powers and privileges in a more ample form than appears necessary for fairly working out the purposes of the contemplated undertaking. From this it follows that such privileges and powers must be interpreted and defined by the Act of the Legislature by which they are conferred, and by that only; that they must be exercised for no other purposes than those for which they were conceded, in no other manner than that prescribed, and in such a way as to cause the least possible inconvenience to individuals. A due appreciation of this principle appears to be of great importance to a proper understanding of the subject now under consideration.

The statute is the measure and limit of aggressive powers and exclusive privileges.

As the powers and privileges conferred are in their nature extraordinary, and involve a departure from or an infringement of the common law, and to that extent an interference with individual rights, they are to be taken as the mere creations of the statute, such and such only as the Legislature intended them to be. From this it follows, that when such powers and privileges are conferred on any association, their nature and extent, commencement, mode of exercise, and termination, can only be ascertained by reference to the special act taken by itself, or to that in combination with the Consolidation Acts which are held to be incorporated with it, as the case may be. All reference to the standing orders of Parliament, to plans or notices given in accordance with their provisions, or to documents which have not been incorporated with the special act, are excluded, even though it could be shown that in consequence of an inaccurate statement in some of these plans or other documents an intended opposition to the bill had been with-

(*a*) *Stewart* v. *Scottish North-Eastern Ra. Co.*, 1859, 21 D. (H. of L.) 5, 3 Macq. 382, 31 Jur. 445, reversing 18 D. 540; but see *Roxburgh Road Trs.* v. *North British Ra. Co.*, 1855, 17 D. 110. See also *Graham* v. *Garnkirk Ra. Co.*, 1847, 9 D. 1508.

drawn (*a*). This is indeed nothing else than a consequence of the general and necessary principle, that the statute is the only authentic exponent of what the Legislature intended to do; and that any other mode of arriving at that intention would involve the risk of allowing parties to exercise powers which the Legislature had withdrawn or had refused to concede. So firmly fixed is this principle in the law, that a private Act of Parliament has been held binding, though due notice had not been given of the intention to apply for it to a party whose rights under a previous Act it rescinded (*b*); and when a Railway Act provided that all persons should have liberty to use the line on payment of the rates specified, this was found to free the company from liability for tolls on goods carried through a burgh, which by its charter was entitled to charge tolls on all goods passing through its boundaries (*c*). Hence, also, where an inchoate contract was entered into, depending for its completion on a parliamentary sanction to be afterwards obtained, and the Act when obtained empowered the parties to enter into the agreement, it was held not to be binding on such as chose to resile; for the Act, though it enabled the parties to complete their agreement, did not declare that such completion had taken place (*d*).

How construed and interpreted.

Powers and privileges of the kind under consideration are strictly construed, and do not, as in some other branches of law, receive a liberal or favourable interpretation. In other words, the rights and liberties of the public are preserved as far as possible, consistently with the words and purposes of the statute (*e*). Hence, exclusive privileges are never presumed. Thus, the circumstance of a gas company having obtained a special act with the concurrence of the magistrates to supply a burgh with gas, was held to imply no exclusive right to carry their pipes through the

(*a*) *North British Ra. Co.* v. *Tod*, 1846, 5 Bell's App. 184, 12 Cl. and Fin. 722, reversing 8 D. 726.

(*b*) *Edinburgh and Dalkeith Ra. Co.* v. *Wauchope*, 1839, 1 D. 1151; aff. 1842, 1 Bell's App. 252, 8 Cl. and Fin. 710.

(*c*) *Edinburgh and Glasgow Railway Company* v. *Magistrates of Linlithgow*, 1859, 21 D. 1215; as revd. 1859, 3 Macq. 691, 21 D. (House of Lords) 15.

(*d*) *Monklands Ra. Co.* v. *Glasgow and Airdrie Ra. Co.*, 1849, 11 D. 1395.

(*e*) *Sir T. Moncreiffe* v. *Perth Harbour Commissioners*, 1843, 5 D. 879, aff. 5 Bell's App. 333, 18 Jur. 631; *Baxter* v. *North British Ra. Co.*, 1846, 8 D. 1212; *Buchanan* v. *Caledonian Ra. Co.*, 1850, 12 D. 778.

streets, or to prevent the magistrates from allowing a new company to do so (*a*).

Such powers must be applied to the intended purposes alone.

Aggressive powers cannot be applied to purposes different from those contemplated in the special act. Thus, where parliamentary trustees were empowered to take certain lands, etc., for the purpose of improving the navigation of a river, it was held that they had no power to effect a compulsatory sale of the feu-duties and ground-annuals of lands proposed to be taken for the purposes of the Act (*b*). The principle applicable in all such cases is, that the statutory powers and privileges must be interpreted and exercised in the way least injurious to the rights and liberties of the subject. Hence, a company possessed of aggressive powers to take land for the purposes of their undertaking are not entitled to take a portion of land manifestly insufficient for such purposes, nor to take the land belonging to one proprietor at different times (*c*). The Legislature always fixes a limited time during which only the aggressive powers it confers can be exercised (*d*); and, as a general rule, if these aggressive powers are once exercised, they cannot be again made available (*e*).

Companies receiving such powers are trustees for the public.

When companies receive rights or powers from the Legislature, which but for its intervention they could not have enjoyed, they cannot delegate them to other companies by lease or otherwise. This doctrine rests on the principle, that as such privileges are conferred for the purpose of carrying out some special undertaking for the benefit of the public, they are only available when exercised for the purposes, in the manner contemplated, and by the parties with whose fitness and trustworthiness to exercise them in this manner the Legislature had been satisfied. By accepting such privileges, a company becomes in fact a trustee for the public interest in all matters within the sphere of its action, so that it

(*a*) *Dundee Gas Co.* v. *Magistrates of Dundee*, 1847, 9 D. 1084.

(*b*) *Todd* v. *Clyde Trs.*, 1843, 6 D. 108. See also *Edinburgh and Glasgow Canal* v. *Earl of Hopetoun*, 1856, 18 D. 655; *Dodd* v. *Salisbury Ra. Co.*, 1 Giff. 158.

(*c*) Lands Clauses Consolidation Act, sec. 116; *Glasg. and Green. Ra. Co.* v. *Glasg. and Aird. Ra. Co.*, 1850, 13 D. 182; *Edin. and Glas. Ra. Co.*, 1850, 13 D. 145.

(*d*) *Sir T. Moncreiffe* v. *Perth Harbour Commissioners*, *supra*; *Wilson* v. *Clyde Trustees*, 1843, 5 D. 1344; *Connell* v. *Clyde Trustees*, 1845, 7 D. 829.

(*e*) *Sir T. Moncreiffe* v. *Perth Harbour Commissioners*, *supra*.

cannot delegate them to others without violating the conditions upon which they were conferred. Hence, where a railway company, after having proceeded a certain length with the formation of their railway, entered into a contract with another company, that, in consideration of assistance to be received in completing the line, it should be worked by that company, who should have full control and exercise all the rights of the original company for twenty-one years, the agreement was declared illegal, and the parties were restrained from carrying it into execution (*a*). So, where it was agreed that one railway company should for a term of ninety-nine years work the lines of another company, using the property and plant of the latter, who were also to fix the fares and rates of charge, and that the first company were to be allowed a sum for working expenses, and were, on the termination of the agreement, to restore the property and plant in a state of equal working value, the agreement was held to be *ultra vires* of both companies, inasmuch as the one company were agreeing to part with statutory powers and to delegate statutory duties to another company, who had no right to accept or exercise them (*b*). Such agreements are often incompetent, as being *ultra vires* of the purposes for which the promoters had brought the company into existence (*c*).

Doctrine must be reasonably construed.

This doctrine must, however, be understood in a reasonable sense, and is not to be carried the length of invalidating temporary arrangements between companies for regulating the traffic and dividing the profits of their respective concerns (*d*).

Enabling Act does not compel performance.

When the words of the special act are enabling and not imperative, the company are not bound to carry out the purposes to which they apply, unless under contract, express or implied, they have gone

(*a*) *Beman* v. *Rufford*, 7 Ra. Ca. 48. See also *Great Nor. Ra. Co.* v. *East. Counties Ra. Co.*, 7 Ra. Ca. 643, 9 Ha. 309. See *Wedderburn* v. *Scottish Central Ra. Co.*, 1848, 10 D. 1317.

(*b*) *Winch.* v. *Birkenhead Ra. Co.*, 7 Ra. Ca. 384, 7 Ra. Ca. 403. See also the judgment of Sir G. Turner, V.-C., in *Simpson* v. *Denison*, 10 Ha. 51.

(*c*) Hodges on Railways, 67 *et seq.*

(*d*) *Shrewsbury and Birmingham Ra. Co.* v. *London and Nor.-West. Ra. Co.*, 16 Beav. 441, 4 De G. M. and G. 115; *Hare* v. *London and Nor.-West. Ra. Co.*, 2 J. and He. 80; 30 Law Jour. (Chan.) 817. When powers to lease are conferred by the special act, they are regulated by 8 and 9 Vict. c. 33, ss. 105, 106; 8 and 9 Vict. c. 96; and 21 and 22 Vict. c. 75, made perpetual by 23 and 24 Vict. c. 41. See 15 D. (H. of L.) 48.

too far to resile. Thus, a Railway Act containing only enabling words does not bind the company to construct their line; and a contract with a landowner for the purchase of his property—the price of which is to be paid on taking possession—cannot be enforced if the company do not execute the line or take the land (*a*).

Right to levy tolls, etc.

When a company are empowered to levy rates or tolls, etc., they are not entitled to exercise this power until the works are completed, or the accommodation is afforded to the public in respect of which the power was conferred. Charges made prior to that event are illegal, and must be repaid (*b*).

In levying any imposts or rates under the powers of an Act, great care must be taken that the statutory provisions are exactly complied with, as any essential variance or misstatement may render the proceedings a nullity, and subject the receivers of the impost in full repetition, notwithstanding there may be no reason to suspect *mala fides* (*c*). The statutory provisions will, however, receive a reasonable interpretation consistent with the purposes and objects of the Act; and therefore, under a statute incorporating a water company, it was held that the company were not prohibited from varying their rate on grounds which were not partial or unreasonable, and that an individual ratepayer was not entitled to object that he was charged at a higher rate than others in a different locality, so long as the rate did not exceed the statutory maximum; and that the company were not prohibited from allowing a discount to their customers, or from paying to proprietors a reasonable remuneration, in consideration of their collecting and guaranteeing their tenants' rates (*d*).

Use of waters.

See, as to rights and obligations of companies in the use of streams, lakes, etc., the cases undernoted (*e*).

How aggressive powers may be enforced.

When the special act confers aggressive powers explicitly, they may be enforced by an application to the Sheriff; but where the

(*a*) *Edin., Perth, and Dundee Ra. Co.* v. *Philip*, 1857, 2 Macq. 514, reversing 16 D. 1065; *Scottish North-Eastern Ra. Co.* v. *Stewart*, 1859, 3 Macq. 382, reversing 18 D. 540.

(*b*) *Dixons* v. *Monkland Canal Co.*, 1821, 1 S. 141, revd. 1825, 1 W. and S. 636; *ibid.* 1830, 8 S. 826, aff. 1831, 5 W. and S. 445.

(*c*) *Magistrates of Dunbar* v. *Kelly*, 1829, 8 S. 128.

(*d*) *Glasgow Water Co.* v. *Kellar*, 1850, 13 D. 359.

(*e*) *Lanark Twist Co.* v. *Edmonstone*, 1810, Hume 520; *Magistrates* v. *Skinners of Inverness*, 1804, M. 13191; *Tassie and Co.* v. *Miller*, 1822, 1 S. 468.

Act is not so specific as to preclude construction or interpretation, the proper form of procedure is by declarator (*a*). The abuse of aggressive powers may be checked by suspension, or suspension and interdict. Sometimes declaratory conclusions may be necessary (*b*). The consequences of such abuse may ground damages against the company; and though the statute creates a particular jurisdiction for settling questions arising under its provisions, this does not always deprive a party conceiving himself aggrieved of his remedy before the ordinary tribunals (*c*).

How restrained.

GENERAL ENACTMENTS.

General statutes applicable to all companies possessing aggressive powers.

We have already seen that aggressive or compulsatory powers, and the right to frame bye-laws which shall be binding on the public, and to impose and exact rates or money payments of any kind for which there is no special contract, can only be obtained by an Act of the Legislature. Such rights and powers are conferred by the company's special act, which at one time contained minute regulations and provisions for their exercise. Latterly, however, as undertakings requiring such extraordinary powers became numerous, and were continually receiving the sanction of the Legislature, several general statements were passed containing such regulations and provisions as had been usually introduced into special acts. Since that period, the special act, as formerly, is required to confer such powers as the Legislature intends the company to possess; but the mode of their exercise is regulated by the general Acts applicable to the undertaking, and they are to this effect held to be incorporated with and to form integral portions of the special act, except in so far as the latter may otherwise provide. These general statutes are the Lands Clauses Consolidation (Scotland) Act, 8 Vict. c. 19 (8th May 1845), which is almost a duplicate of the corresponding English Act, 8 Vict. c. 18, passed on the same

(*a*) *Tennant and Co.* v. *Turner*, 1837, 16 S. 192.

(*b*) *Baxter* v. *North British Ra. Co.*, 1846, 8 D. 1212; *Dalgleish* v. *Stirling and Dunfermline Ra. Co.*, 1847, 9 D. 505; *Buchanan* v. *Caledonian Ra. Co.*, 1850, 12 D. 778.

(*c*) *Shand* v. *Henderson*, 1814, 2 Dow 519; *Goldie* v. *Oswald*, 1814, 2 Dow 534; *Burnet* v. *Knowles*, 1815, 3 Dow 280; *Colt* v. *Caled. Ra. Co.*, 1859, 21 D. 1008, H. of L. 3 Macq. 833.

day, and known as the Lands Clauses Consolidation Act; and the Lands Clauses Consolidation Acts Amendment Act, 23 and 24 Vict. c. 106 (20th August 1860), which is applicable both to England and Scotland, and which somewhat modifies and adds to the provisions of the Acts above mentioned. These Acts, read in connection with the special act, apply to every company authorized to exercise aggressive powers for the acquisition of land for the purposes of undertakings of a public nature, and regulate the mode of ascertaining the compensation to be given for the lands, etc., so acquired.

The Enclosure Acts, 17 and 18 Vict. c. 97 (1854), and 20 and 21 Vict. c. 31 (1857), also contain provisions relative to the English Lands Clauses Consolidation Act of 1845, but they do not appear to be applicable to Scotland.

General statutes applicable to railways.

The construction of railways involves many peculiarities not presented by other undertakings, and therefore a general Act was in 1845 passed for their special use. It is the 8 and 9 Vict. c. 33 (21st July 1845), known as the Railways Clauses (Scotland) Consolidation Act, and, as in the former case, is almost a duplicate of the corresponding English Act, 8 and 9 Vict. c. 20, passed 8th May 1845, and distinguished as the Railways Clauses Consolidation Act. The provisions of both these Acts were afterwards somewhat altered and extended by the Railways Clauses Act, 1863, 26 and 27 Vict. c. 92, passed 28th July 1863. These general Railway Acts require the company to have obtained aggressive powers by its special act, and to be subject to the Lands Clauses Acts before specified; and when this is so, they furnish it with certain additional powers, and make certain provisions and regulations for the exercise of its powers generally. Besides these enactments, the Act 5 and 6 Vict. c. 55, passed 30th July 1842, confers on railway companies in operation certain aggressive powers by secs. 12, 13, 14, and 15, to be used in cases of making branch communications, altering of levels, entering on lands to repair accidents, and extending the line when thought necessary for safety by the Board of Trade.

Practically applied to corporations.

All these enactments, intended to regulate the exercise of aggressive powers, and making the bye-laws binding on the public, are, with one exception, so conceived as to be applicable not only to corporations, but to common law companies, and even to indivi-

duals, provided that, by special act, they have been vested with such powers. Yet practically they are applicable to corporations only; for it is not probable that the Legislature would in the present day confer aggressive powers, for the purpose of carrying out a public undertaking of the kind intended by these statutes, on an individual, or on the fluctuating membership of an unincorporated association. It may be observed that, in the last general Act applicable to railways, the Railway Construction Facilities Act, 1864, the effect of the certificate, when obtained by a company not previously incorporated, is to make it a corporation (*a*).

Mode of treating the subject.

In pursuing our examination into this branch of the subject, we shall enter somewhat fully into the Lands Clauses Act, and shall afterwards consider more briefly the provisions of the Railway Clauses Act, and other statutes which bear upon this part of the treatise. When reference is made to the consolidated statutes which were passed in duplicate, those applicable to Scotland are always intended, unless the contrary is expressly stated.

(*a*) It does not affect the truth of these observations, that the powers of the Act have been conferred on government boards or officials, for such are always corporations aggregate or sole; nor that the Crown is, by 7 and 8 Vict. c. 85, sec. 11, empowered in certain circumstances to purchase railways, since the Crown is a corporation sole.

CHAPTER XII.

LANDS CLAUSES CONSOLIDATION ACT.

Application of Lands Clauses Act.

THE Lands Clauses Consolidation (Scotland) Act (*a*) applies to any undertaking in Scotland authorized by special act obtained subsequently to the 8th of May 1845, to exercise compulsatory powers for the acquisition of land, and, as in the case of the other Consolidation Acts, is held to be incorporated with the special act, except in so far as its provisions may be varied or excepted by those of the latter (preamble and sec. 2). But inasmuch as it may be found convenient in some cases to incorporate with the special act some portions only of the general Act, this may be done by specifying the clauses intended to be incorporated in the preamble to the special act (sec. 5). The Act may be referred to in other Acts, and in legal instruments, as the Lands Clauses Consolidation (Scotland) Act, 1845 (sec. 4).

Powers to purchase and convey.

The company having obtained their special act, are empowered to agree with the owners of the lands authorized to be taken, and with all parties having any right or interest therein, for the absolute purchase of the right of property (sec. 6) (*b*); and in like manner the Act confers full powers on such parties to dispose of the lands, or such interest as they may have in them, to the company, notwithstanding of any entails, trusts, corporate rights, etc., which would otherwise affect the validity of the transaction (secs. 7, 8).

(*a*) 8 and 9 Vict. c. 19 (8th May 1845). The corresponding English Act, of which this is a mere transcript, with the necessary alterations in technical language and remedial details, is the Lands Clauses Consolidation Act, 8 and 9 Vict. c. 18 (8th May 1845).

(*b*) Where a conventional agreement has been made, it will be strictly enforced, even in its penal clauses. *Glasgow and Ardrossan Canal Co.* v. *Glasgow and Greenock Ra. Co.*, 1850, 13 D. 182.

In the general case, the owners or others interested in the lands authorized to be taken, may make any agreement as to price or compensation with the company they think proper; but where, except for the provisions of the statute or special act, they would not be entitled to exercise the power of alienation, the purchase-money or compensation, if not fixed by the Sheriff, a jury, arbitration, or a valuator appointed by the Sheriff in terms of the statutory provisions, must not be less than that determined by the valuation of two practical valuators, one nominated by each party, and in case of their not agreeing, of a third valuator appointed by the Sheriff. The valuation must be authenticated by a declaration in writing, signed by the valuators (sec. 9). When conferred by statute.

Instead of a sum of money, the consideration may be in all cases an annual feu-duty or ground-annual payable by the company. This annual payment must be charged on the tolls or rates, if any, payable under the special act; and may be otherwise secured as the parties may agree. If the feu-duty or ground-annual is not paid by the promoters within thirty days after it becomes payable, and after demand in writing, the creditor may recover the amount with costs by action against the promoters, or may levy it by poinding and sale of their goods and effects (secs. 10 and 11). These provisions, which were originally limited to the case of parties entitled in their own right to dispose absolutely of the lands acquired, are now extended to cases where the parties to the sale are under incapacity or disability, and could not alienate except under the statutory powers (23 and 24 Vict. c. 106, sec. 3). What consideration may be.

The whole of these provisions apply to cases where the company are empowered by their special act to purchase lands for extraordinary purposes (*a*) (sec. 12). When such powers are possessed, the lands acquired under them may be disposed of as the company see fit, and others may be again purchased in their place; but the total amount of land held at any one time by the company for extraordinary purposes must not exceed the quantity prescribed (sec. 13). It must, however, be observed, that the company cannot, under the power to purchase land for extra- Lands purchased for extraordinary purposes.

(*a*) That is, lands which, by their special act, the company are empowered to take in certain circumstances for other purposes than the mere completion of the undertaking, in terms of their plans and specifications.

ordinary purposes, acquire more than the prescribed quantity from any party who, without the statutory provisions, would not have power to alienate; and if the prescribed quantity have once been acquired from such persons, and be afterwards disposed of, it cannot be again purchased from persons of this description (sec. 14).

Aggressive powers cannot be used till the subscribed capital is paid up;

When the undertaking is to be carried into effect by means of a capital to be subscribed by the shareholders, the whole of the capital of the company, or estimated sum for defraying the expenses of the undertaking, must be subscribed under contract, before any of the powers contained in the general or special act as to taking of land can be exercised (sec. 15) (*a*). The certificate of the Sheriff is sufficient evidence that this provision has been complied with (sec. 16).

nor after elapse of prescribed period.

These powers cannot be exercised after expiration of the prescribed period; and if none is prescribed, not after three years from the passing of the special act (sec. 116). But it has been held that, if notice has been given of intention to take lands before elapse of the prescribed period, all the subsequent steps might be taken after; the principle being that, by giving such notice, the company have exercised their powers of compulsatory purchase, and that all that follows is mere matter of detail (*b*).

Aggressive powers always determined by the special act.

The powers to take land for the purposes of the undertaking, assumed to be conferred on companies brought under the operation of this Act, are always to be interpreted in strict accordance with the company's special act. Therefore, when a clause was contained in a special railway act declaring that it should not be lawful to take the land of another railway company, except with consent of the company, it was held that this provision controlled the general powers to take land necessary for the purposes of the undertaking, in so far as related to the property of the company, the rights of which were so protected (*c*).

Exception.

Where, however, the procedure to have the amount of compen-

(*a*) This does not apply to branch railways made by an existing company; *R.* v. *Great West. Ra. Co.*, 1 E. and B. 253; *Weld* v. *South-West. Ra. Co.*, 32 Beav. 340.

(*b*) *Edinburgh and Glasgow Ra. Co.* v. *Monklands Ra. Co.*, 1850, 12 D. 1304, and 13 D. 145; *R.* v. *Birmingham and Oxford Ra. Co.*, 19 Law Jour. (Q. B.) 453, and 20 Law Jour. (Q. B.) 304; *Great Northern Ra. Co.*, 17 Q. B. 840; *Sparrow* v. *Oxford and Worcester Ra. Co.*, 9 Ha. 436, 7 Ra. Ca. 92; *North Stafford Ra. Co.*, 16 Q. B. 526; *South Devon Ra. Co.*, 16 Q. B. 539.

(*c*) *Caledonian Ra. Co.* v. *Edinburgh and Glasgow Ra. Co.*, 1854, 17 D. 162.

sation ascertained has miscarried through the fault of one of the parties, such party cannot plead that the statutory period has elapsed so as to prevent the provisions of the Act being carried out, even after the prescribed period (*a*).

Notice of intention to take lands.

The first step on the part of the company intending to take land under their compulsatory powers is to give notice to all parties interested in the lands required, or enabled by the general or special acts to make the conveyance, or to such of them as after diligent inquiry can be discovered. The notice must require from such parties the particulars of their interests, and of the claims made by them in respect thereof, and must state the particulars of the lands required, the willingness of the company to treat for the purchase, and their readiness to make compensation for any damage caused by execution of the undertaking (sec. 17). Such notices must be served on those entitled to receive them, personally, or by leaving them at their last usual place of abode. If the owners are out of the kingdom, or cannot be found, service must be made on their factors or agents, if any; and a copy must also be left with the occupier, and if there be none such, it must be affixed on some conspicuous part of the lands (sec. 18).

Effect of notice.

The immediate effect of this notice seems to be, to establish to a certain extent, and for certain purposes, a contract of sale between the company and the parties entitled to convey the lands required, for a price to be fixed in one or other of the modes provided by the Act (*b*). The consequence of this is, that the company cannot abandon their purchase, except with consent of the seller, but may be compelled to take the statutory procedure for having the lands valued (*c*). They cannot without consent of parties limit their

(*a*) See *Commissioners for Harbour of Leith* v. *Trinity Harbour Co.*, 1842, 4 D. 1056. This was a case which arose before the Lands Clauses Act was passed; but it was under a special act which contained provisions almost identical.

(*b*) *Glasgow and Monklands Ra. Co.* v. *Glasgow Waterworks Co.*, 1849, 11 D. 1153; *Edinburgh and Glasgow Ra. Co.* v. *Monklands Ra. Co.*, 1850, 12 D. 1304, and 13 D. 145; *Edinburgh and Dundee Ra. Co.* v. *Leven*, 1848, 10 D. 1013, aff. 1852, 1 Macq. 284, 1 Stu. 686; *R.* v. *Commissioners of Manchester*, 4 B. and Ad. 333; *Doo* v. *London Ra. Co.*, 1 Ra. Ca. 257; *Sparrow* v. *Oxford and Worcester Ra. Co.*, 7 Ra. Ca. 92; *Stone* v. *Commercial Ra. Co.*, 1 Ra. Ca. C. 375; but see specially *Haynes* v. *Haynes*, 1 Dr. and Sm. 426, which contains a review of all the authorities.

(*c*) *R.* v. *Hungerford Market Co.*, 4 B. and Ad. 327.

demand by a subsequent notice (*a*). The only exception to this rule is in the case of notice given by commissioners for public works (*b*). If, however, having given notice for a part, more land be required, they may give a second notice. Thus, though they cannot abandon either in whole or part the notice already given, they may increase the amount required by a new notice to the full extent of their aggressive powers. This question was raised, but left undetermined, in two Scotch cases (*c*); subsequently, however, it was settled in England as here stated (*d*). It is clear, however, from the cases noted below, that the courts will not sanction anything like a vexatious or unnecessary multiplication of notices (*e*). When great delay has taken place in proceeding on notices, they will be held to have been abandoned (*f*).

Great accuracy required in notice.

Great care must be taken that the notice specify accurately the quantity and situation of the lands required; and interdict will be granted against the company completing their operations on any portion of ground not included in the notice (*g*). To prevent mistakes of this kind, it is a good practice to annex a plan to the notice (*h*). If the notice be for more land than the special act authorizes to be taken, any assessment under the provisions of the statute would seem to be invalid *quoad* the excess, and incapable of conferring a title on the company (*i*); but this does not affect the validity of any award under a submission not intended to proceed under the statute (*k*).

(*a*) *Laing* v. *Caledonian Ra. Co.*, 1846, 9 D. 70, and 1850, 12 D. 481; *Tawney* v. *Lynn and Ely Ra. Co.*, 4 Ra. Ca. 615; *R.* v. *York and North Midland Ra. Co.*, 1 E. and B. 178; *R.* v. *Ambergate Ra. Co.*, 1 E. and B. 372.

(*b*) *R.* v. *Commissioners for Woods and Forests*, 15 Q. B. 761.

(*c*) *Turnbull* v. *Scot. Cen. Ra. Co.*, 1848, 10 D. 373; *Douglas* v. *Caledonian Ra. Co.*, 1848, 11 D. 225.

(*d*) *Stamps* v. *Birmingham Ra. Co.*, 6 Ra. Ca. 123; *Webb* v. *Manchester and Leeds Ra. Co.*, 4 My. and Cr. 116; *Simpson* v. *Lan. and Car. Ra. Co.*, 4 Ra. Ca. 625; *Sadd* v. *Maldon and Braintree Ra. Co.*, 6 Exch. 143.

(*e*) See *Perth Harb. Com.* v. *Moncrieffe*, 1846, 5 Bell's App. 333, and preceding cases.

(*f*) *Hedges* v. *Metropol. Ra. Co.*, 28 Beav. 109.

(*g*) *Campbell Renton* v. *North Brit. Ra. Co.*, 1845, 8 D. 247; *Kemp* v. *London and Brighton Ra. Co.*, 1 Ra. Ca. 495.

(*h*) *Sims* v. *Commercial Ra. Co.*, 1 Ra. Ca. 431.

(*i*) *Mouchet* v. *Great West. Ra. Co.*, 1 Ra. Ca. 567; *Lan. and Car. Ra. Co.* v. *Maryport Ra. Co.*, 4 Ra. Ca. 504.

(*k*) *Scott* v. *North British Ra. Co.*, 1847, 19 Jur. 643.

Estoppel by waiver.

A party may be estopped from objecting to irregularities in the notice, or to the want of it altogether, if by entering into negotiations with the company he has manifestly waived such objections (*a*).

When lands are possessed by officer of Court.

When the lands required are in possession of a judicial factor or other officer appointed by the Court, an application should be made to the Court before carrying out the statutory powers; at least this has been deemed necessary in England (*b*).

Claim for compensation by owner.

On being served with the notice, the owner or other party interested in the lands ought at once to return the particulars of his claim (sec. 19). In doing this, great care should be taken to state accurately the nature of the interest held in the lands required, as an error in this respect may be of serious consequence in the subsequent procedure (*c*). If the owner or other person interested do not make this return, or fail to treat with the company for twenty-one days, or if during that period no agreement has been made as to the amount of compensation, it becomes a case of disputed compensation. Care must also be taken to make the claim relevant, otherwise the whole subsequent procedure may go for nothing (*d*).

ASSESSMENT OF CLAIMS.

How claims to be determined.

If the compensation claimed do not exceed £50, it falls to be determined by the Sheriff, unless both parties agree to refer it to arbitration (secs. 20 and 21). If, on the other hand, the sum claimed or offered exceeds £50, the question must be determined by arbitration or a jury (secs. 23 and 36). If the claimant does not require arbitration, the statute provides that the matter shall be determined by a jury; and for this purpose the company are required to give the party ten days' notice of their intention to cause a jury to be summoned, and this notice must state the amount of compensation the company are willing to pay (sec. 37). If the claimant

(*a*) *Campbell Renton* v. *North Brit. Ra. Co.*, 1847, 9 D. 1209; *R.* v. *Committee for South Holland Drainage*, 8 A. and E. 429.

(*b*) *Re Taylor*, 6 Ra. Ca. 741; *Tink* v. *Rundle*, 10 Beav. 318.

(*c*) As to this, see the following cases: *Healey* v. *Thames Valley Ra. Co.*, 1864, 10 E. Jur. N. S. 1182; *North Stafford Ra. Co.* v. *Landor*, 2 Exch. 235; *Cameron* v. *Char. Cross Ra. Co.*, 16 C. B. N. S. 430; *Bradshaw's* Arbitration, 12 Q. B. 562; *North Stafford Railway Company* v. *Wood*, 2 Exch. 244.

(*d*) *Edinburgh and Leith Glass Co.* v. *North Brit. Ra. Co.*, 1862, 24 D. 1236.

prefer arbitration, he must state so by notice in writing to the company before they have presented their petition to the Sheriff to summon a jury; and in this notice he must state the nature of his interest, and the amount of the compensation he claims. If they do not accept his terms, and enter into a written agreement to that effect within twenty-one days after receipt of the notice, the question must be settled by arbitration (sec. 23). If, again, the claimant desires a jury, he may notify this to the company, stating the nature of his interest and the amount of his claim; and if the terms are not agreed to in writing within twenty-one days, and in the absence of any arrangement as to arbitration, they must present their petition to the Sheriff to summon a jury, under pain of being liable to the claimant in the amount of the compensation he claims, which may be recovered by him with costs in any competent court (sec. 36) (*a*).

It would thus appear, that if the sum claimed and disputed does not exceed £50, it must, unless both parties agree, be settled by the Sheriff; and that if it be above that sum, it must be determined by a jury, unless the claimant elect arbitration. The company have in the last case no option. All they can do is to apply to the Sheriff to summon a jury; and if they delay to do this, the claimant may compel them, under pain of having to assent to his demands however exorbitant.

Lastly, if the matter has been referred to arbitration, and the arbiters or their umpire have for three months failed to make an award, it must be determined by the verdict of a jury (sec. 35).

INQUISITION BY SHERIFF.

Inquisition before the Sheriff.

In cases under £50, on the application of either party, the Sheriff issues an order for appearance at the time and place named. On the parties appearing, or in the absence of any of them, on proof of due service of the order, he determines the question, examining the parties and their witnesses on oath, but without either written pleadings, or reducing the evidence to writing. The costs of every such inquisition, excepting his own remuneration, are in the Sheriff's discretion, and his determination is not subject to any review or appeal (sec. 22).

(*a*) See as to form of notice to the company, *Forth and Clyde Ra. Co.* v. *Ewing*, 1864, 2 Macph. 684.

INQUISITION BY ARBITRATION (*a*).

Inquisition by arbitration.

When compensation is to be determined by arbitration, both parties may concur in the appointment of a single arbiter; otherwise, each party on the request of the other appoints one. But if for fourteen days after the dispute has arisen, and after a request in writing stating the matters required to be settled has been served by the one party on the other, either fail to name an arbiter (*b*), the party who has made the request and named an arbiter may authorize such arbiter to act for both parties (sec. 24). If one of two arbiters refuse, or for seven days neglect to act, the other may proceed *ex parte* (sec. 29). If either die or become incapable, the party by whom he was appointed may appoint another; but if he delay to do so for seven days after written notice from the other party, the surviving arbiter may proceed as in the last case (sec. 25). The award of the single arbiter in these circumstances is always final (secs. 25 and 29). If, however, a single arbiter die or become incapable, the matter referred must be determined by a new arbitration, as if no arbiter had been appointed (sec. 28).

Umpire.

When there are two arbiters, they are required to appoint an umpire before entering on their inquiry, and on his death, or supervening incapacity, to appoint another without delay (sec. 26). On their failure to do so for seven days, the Lord Ordinary may make the appointment (sec. 27) (*c*).

Consequences of failure to make award.

If within twenty-one days from the date of their appointment, or within such more extended time as they themselves have fixed, the arbiters fail to make their award, the matter must be determined by the umpire, whose decision in all cases is final (sec. 30). And if for three months no award is made, the matter must be determined by a jury (sec. 35).

Appointment of arbiter, how made.

Every appointment of an arbiter by the company taking the land must be under the hand of their secretary or of two directors. The arbiter for any other party is appointed under the hand of such party, and if such party be a company or corporation, under the

(*a*) See Bell on Arbitration, 370; Russell on Arbitration, 98.

(*b*) *Bradley*, 5 Ex. 769.

(*c*) The Lord Ordinary cannot recall his appointment, the person he has appointed not being legally disqualified. *M'Kenzie* v. *Inverness and Rossshire Ra. Co.*, 1861, 24 D. 251.

hand of an officer or person appointed for the purpose (sec. 24). The appointment so made is delivered to the arbiters, and is irrevocable without the consent of both parties, nor does it fall by the death of either party (sec. 24).

Decisions.

In relation to these provisions, it has been decided that the prorogation to the day of of a submission under this Act, does not render it a common law submission, so as to fall by the death of either party (*a*). A submission, however, may be so framed as to be partly statutory and partly at common law, and so neither to fall by the lapse of three months without an award, as it would do under the Act, nor by the death of one of the parties, as it would do at common law (*b*). In a similar case, where the arbiters did not pronounce their decree for two years, it was held that the award, though not pronounced in terms of the statute, might be homologated (*c*). It would also seem that the submission may always be renewed by consent of parties (*d*). Where arbiters appointed under the statute differed in opinion, and the umpire nominated having declined to act, there was no award pronounced, it was held that the provisions of the 35th section applied, and that the question must be settled by a jury (*e*). A submission may be validly entered into for settling claims of compensation so as not to be under the provisions of the Act, and so as that these shall not be binding on the parties (*f*). If, however, a reference be entered into under the statutory provisions simply, the parties cannot afterwards waive adherence to its rules in the conduct of the proceedings; and therefore, where, on the expiry of an arbitration and its prorogation by the parties, no oversman had been appointed, the proceedings were held void, because the statute declares that they shall make such appointment before entering on the matters referred (*g*).

Powers of arbiters, etc.

The arbiters may call for any document in the possession of either

(*a*) *Caledonian Ra. Co.* v. *Lockhart's Trustees*, 1849, 12 D. 338.

(*b*) *Caledonian Ra. Co.* v. *Lockhart*, 1857, 19 D. 527; aff. 1860, 22 D. (H. of L.) 8, 3 Macq. 808.

(*c*) *Dundee and Aberdeen Ra. Co.* v. *Richardson*, 1851, 13 D. 552.

(*d*) *Hill* v. *Dundee and Aberdeen Ra. Co.*, 1852, 14 D. 1034, 24 Jur. 642; *Laing* v. *Caledonian Ra. Co.*, 1846, 9 D. 70; *Palmer* v. *Metropolitan Ra. Co.*, 31 Law Jour. (Q. B.) 259; *Tyerman* v. *Smith*, 6 E. and B. 719.

(*e*) *Anderson* v. *Deeside Ra. Co.*, 1853, 15 D. 713.

(*f*) *Scott* v. *North British Ra. Co.*, 1847, 19 Jur. 643.

(*g*) *Glasgow, Barrhead, etc., Ra. Co.* v. *Nitshill Coal Co.*, 1850, 7 Bell's App. 325, reversing 11 D. 327.

of the parties, and may also examine the parties and their witnesses on oath (sec. 31). This, however, does not give them the power of compelling the production of the one or the attendance of the other. If such procedure be necessary, it would seem that the proper course is to present a petition to the Court or the Judge Ordinary, who, as in a common law submission, will grant warrant as required (*a*).

Cost of arbitration.

The expenses of and incident to the arbitration are settled by the arbiters or their oversman, and borne by the company, unless the award be for the same or a less sum than had been offered. In such cases both parties bear their own expenses; but in all cases the expenses of the arbiters or umpire, and of recording the award, fall upon the company (sec. 32).

Where an umpire in a statutory submission found the claimant entitled 'to all the expenses of the arbitration and incident thereto,' it was held that under this finding he was not entitled to recover from the company sums paid by him to unprofessional persons whom he had adduced to prove injury to amenity (*b*).

By the common law of Scotland an arbiter has implied power to give costs (*c*); whereas, by that of England, he can only do so when he has express authority for that purpose (*d*). Hence, in cases where there is reason to believe that this difference between the two legal systems comes into play, English decisions are not safe precedents.

It has been held in England that the decree for costs may be made after elapse of the period limited for making the award (*e*); and it seems that the award will not be invalid, because it does not find and state the amount of costs, as this omission may be supplied by a subsequent instrument (*f*). Yet in Scotland it is the prudent and correct practice for the arbiter to fix the costs at a specific sum (*g*).

(*a*) See Chambers and Paterson's Law of Railway Companies, p. 206.

(*b*) *Younger* v. *Caledonian Ra. Co.*, 1847, 10 D. 133.

(*c*) *Robertson* v. *Brown*, 15 S. 199; *Fairley* v. *M'Gown*, 14 S. 470; *Ferrier* v. *Alison*, 5 D. 456; aff. 4 Bell's App. 161 (1845).

(*d*) *Ex parte Raynal*, 16 Law Jour. (Q. B.) 304; Hodges on Railways, p. 293.

(*e*) *Collins* v. *South Staffordshire Ra. Co.*, 7 Exch. 5; *Martin* v. *Leicester Waterworks Co.*, 27 Law Jour. (Exch.) 432, 4 H. and N. 461.

(*f*) *Gould* v. *Stafford Potteries Waterworks Co.*, 5 Exch. 214, 6 Ra. Ca. 568, overruling *London and N.-W. Ra. Co.* v *Quick*, 5 D. and L. 865. See *Younger* v. *Caledonian Ra. Co.*, *supra*.

(*g*) *Paterson*, 1829, 7 S. 616; *Younger* v. *Caledonian Ra. Co.*, *supra*; Bell on Arbitration, 228.

Award must be in writing.

The arbiters must make their award in writing, and may either themselves cause it to be recorded in the books of Council and Session, or may deliver it to the company for that purpose. The latter are bound on demand, and at their own expense, to furnish an extract to the other party, and this is declared to be of equal authority with the original (sec. 33). No award can be set aside for irregularity or error in matter of form (sec. 34).

It is not competent to prove by parole what were the grounds upon which the award proceeded, or that any engagement had been entered into before the arbiter by the opposite party, which does not appear from the award (*a*).

INQUISITION BY JURY.

Inquisition by jury.

If the amount of compensation demanded or offered exceed £50, and the claimant does not require arbitration, or if no award be made for three months (*b*), or if the claimant specially desire a jury, that is the proper mode of ascertaining the compensation (secs. 35, 36). The proceedings originate by the company presenting a petition to the Sheriff to summon a jury. This must be signed by the secretary, or other person appointed by the company for that purpose, and if not a company or a corporation, by any two of the promoters of the undertaking (sec. 38) (*c*).

Notice of ten days.

Previous to this, however, the company, as already mentioned, must have given ten days' notice of their intention to the claimant, stating also what amount of compensation they are willing to give. The want of this in the notice has been held to invalidate all the subsequent proceedings (*d*). It must also be observed, that though

(*a*) *Guthrie* v. *Glasgow and South-Western Ra. Co.*, 1858, 20 D. 825.

(*b*) See *Falconer* v. *Aberdeen Ra. Co.*, 1853, 15 D. 352, where it was held that it made no difference whether the arbitration, which proved abortive, was a statutory or an ordinary submission.

(*c*) *Stone and Others* v. *Commercial Ra. Co.*, 4 Mylne and Cra. 122.

(*d*) A railway company was authorized to carry their line through the lands of a water company, with the option of erecting works for the protection of the water company, or purchasing the property. The railway law agents intimated that they intended to purchase, and a submission was entered into to fix the price, but this expired without a final award. The water company having then intimated that they wished the price to be determined by a jury, in terms of the Act, the railway applied for an

the company's petition to the Sheriff has been presented on the special requisition of the claimant, this does not dispense with the necessity of the ten days' notice on the part of the company. Inattention to this was found to render the petition presented by a company incompetent, and to subject them in payment of the full sum claimed in terms of the 37th section of the Act (*a*). If the company refuse to present their petition, the claimant cannot himself do so. His remedy lies in the 36th section of the Act, in conformity with which he may serve notice on the company requiring them to present their petition, or to take the alternative of paying the amount of compensation named in his notice; when, if they still delay for twenty-one days, they become liable to the claimant for such compensation with expenses (*b*).

Summoning of jury.

On receipt of the petition from the company, the Sheriff must summon a jury of twenty-five indifferent persons, duly qualified as common jurymen in the Court of Session, to meet at a time and place named in the warrant (sec. 39). Of the time and place so fixed the company must give at least ten days' notice to the claimant or his known agent (sec. 40) (*c*). Of the jurors appearing on the summons, a jury of thirteen is drawn by ballot; and if an insufficient number attend, bystanders or others that can be most readily procured with the due qualification, may be called upon to serve.

interdict; but the Court, holding that the intimation by the law agents was a declaration of option on the part of the railway to purchase, it not being averred that their agents were acting without authority, and that such declaration constituted, under the statute, a completed contract of sale, refused the application. —*Glasgow and Monkland Ra. Co.* v. *Glasgow Waterworks Co.*, 1849, 11 D. 1153.

(*a*) *Edinburgh, Perth, and Dundee Ra. Co.* v. *Leven*, 1848, 10 D. 1013; aff. 1852, 1 Macq. 284.

(*b*) This does not, however, hold good where the claim does not set forth any relevant ground for asking compensation. This is very different from the case where a relevant ground being stated, the company denies its accuracy; and therefore, where no relevant claim had been set forth, it was held that the statutory penalty was not incurred.—*Edinburgh and Leith Glass Co.* v. *North British Ra. Co.*, 1862, 24 D. 1236. A tenant must also state his claim, so that the full amount may at once be paid, and not as a yearly payment.—*Falconer* v. *Aberdeen Ra. Co.*, 1853, 15 D. 352.

(*c*) It is very singular that the Scotch Act contains no provision requiring the Sheriff to give notice to the company of the time and place appointed by him for the inquisition, though they are required to give notice of these particulars to the claimant. This provision is contained in the corresponding English Act, s. 41. The omission is evidently an oversight. The notice is always given in practice.

Any of those drawn are liable to be challenged on cause shown, and each party has besides three peremptory challenges (sec. 41).

Special jury.

At the request of either party the jury may be special. If the request proceed from the claimant, he must give notice to the company before they have presented their petition to the Sheriff, that is, before elapse of the ten days after he received notice of their intention to present their petition. But the company may have a special jury without giving notice to the claimant. On receipt of the petition for a special jury, the Sheriff summons both parties before him at a time and place appointed by him (not less than five days from the service of the summons), to strike the jury in the ordinary manner. He then names a day, of which he gives four days' notice, for reducing the jury to twenty. The mode of doing this is that observed in the Court of Session (sec. 53). The special jury consists of thirteen of the twenty who first appear on their names being called, subject to lawful challenge. Any deficiency in the number may be made up from such other disinterested persons, qualified as common jurors, as chance to be in attendance or can readily be procured, and who have not been previously struck off the list, and are not validly challenged. The trial is attended with the like incidents, consequences, and penalties as those of a trial by a common jury (sec. 54). Any other inquiry than that for which the jury have been struck and reduced may be tried before them, provided the parties to it give their consent (sec. 55).

Procedure at inquest.

The Sheriff presides at the inquisition, the claimant is deemed to be the pursuer, and the mode of procedure is the same as that in criminal trials; the verdict is consequently returnable by a majority. At the desire of either party, the Sheriff will order a view by seven or more of the jury (sec. 42); and on a written request by either party, he will summon any person as a witness (sec. 44).

Regulations as to jury.

The jury are subject to the same regulations, pains, and penalties as apply in civil causes in the Court of Session; but, in addition, any juror, whether common or special, who, without a reasonable excuse, fails to appear, refuses to be sworn, or otherwise neglects his duty, forfeits a sum not exceeding £10. Such penalties, as far as they go, are applied to the cost of the inquisition (sec. 43). A witness, in like manner, failing to appear, after being

duly summoned and tendered his 'reasonable expenses,' or on appearing, refusing to be examined on oath, forfeits a sum not exceeding £10 to the party aggrieved, besides being subject to the same regulations, pains, and penalties as an ordinary witness in any other cause (sec. 45).

What if claimant do not appear.

If the claimant do not appear, no further procedure takes place before the jury, but the compensation is ascertained by a valuator appointed by the Sheriff, as afterwards explained (sec. 46). If the claimant appears, the Sheriff swears the jury that they will 'truly and faithfully inquire of and assess' the compensation or damage; and he also swears such persons as are called to give evidence (sec. 47).

Form of verdict.

When the claim is both for the value of the land purchased and for compensation for injury to lands held therewith, the verdict contains two findings of compensation—one applicable to each part of the claim. The parties may, however, agree to dispense with such separate finding (sec. 48).

Duties of Sheriff.

The Sheriff gives judgment for the amount assessed, and signs the verdict and judgment, which are kept by the Sheriff-clerk among the records of the court. They are deemed records, and they or official copies are declared good evidence. All persons may inspect and have copies or extracts of them for a small payment (sec. 49).

Costs.

The expenses of the inquisition must be borne by the company, unless the verdict be given for the same or a less sum than that offered (*a*), or unless the claimant fail to appear at the trial after having received due notice. In either of these cases the expenses are divided, under deduction of the Sheriff's remuneration, which is always laid on the company (secs. 50, 51). In case of difference, the amount of expenses is settled by the Sheriff; and the Act carefully ascertains what are to be considered proper claims of expenses and remuneration on the part of that official (sec. 51). If the amount of expenses to be borne by the company be not paid within seven days, they may be recovered under the Sheriff's warrant by poinding and sale. Expenses payable by the claimant may be

(*a*) In a case where the special Act contained provisions similar to those afterwards embodied in the Lands Clauses Act, it was held that when the offer and the verdict are not capable of being compared, by reason of a difference in the *media concludendi*, the statutory provisions do not apply.—*Speirs* v. *Ardrossan Canal Co.*, 1827, 5 S. 714.

retained by the company out of the compensation awarded, and the balance, if any, of such expenses may be recovered as before by poinding and sale (sec. 52).

English law.

It has been held in England, that the jury have no power to inquire whether the claimant has a proper right or title to compensate, but must assume that he possesses this, and assess compensation accordingly (*a*). This, however, as an absolute proposition, has been doubted (*b*). It has also been held that the Sheriff and jury cannot inquire into the validity or import of what took place prior to the petition to the Sheriff, but must go on with the inquisition though their proceedings may ultimately prove a nullity (*c*). The jury may, however, find that no compensation is due (*d*).

INQUISITION BY VALUATORS.

Compensation by valuators.

If the party entitled to compensation cannot treat with the company in consequence of being absent from the kingdom, or cannot after diligent search be found, or fails to appear at the inquisition after due notice, the compensation for permanent injury is assessed by a valuator appointed by the Sheriff on application by the company (secs. 56, 57). Before entering on the duties of his office the valuator makes and subscribes an oath *de fideli administratione*, adhibited to his nomination (sec. 58); and the valuation, when made by the valuator, with his nomination and oath attached to it, must be preserved by the company, and be produced by them at any time to all having interest (sec. 59) (*e*). The whole expenses of this method of assessing compensation fall on the company (sec. 60).

Remedies of claimant if dissatisfied.

If the owner should afterwards be dissatisfied with the amount of compensation thus awarded, he may, before applying to the Court for payment or investment, have the matter submitted to arbitration by giving notice to that effect in writing to the company

(*a*) *R.* v. *Lond. and Nor.-West. Ra. Co.*, 3 E. and B. 443; *Chapman* v. *Monmouth. Ra. Co.*, 2 H. and N. 277; *Metropolitan Ra. Co.*, 32 Law Jour. (Q. B.) 367.

(*b*) See *per* Erle, C. J., in *R.* v. *Lond. and Nor.-West. Ra. Co.*, *supra*; and *per* Willes, J., in *Chapman* v. *Monmouth. Ra. Co.*, *supra*.

(*c*) *Taylor* v. *Clemson*, 2 Q. B. 978; *Ostler* v. *Cooke*, 18 Q. B. 831.

(*d*) *R.* v. *Lancaster and Preston Ra. Co.*, 6 Q. B. 759.

(*e*) The want of the declaration on oath has been held to nullify the whole proceedings. *Midland Ra. Co.* v. *Gray*, 1850, 13 D. 410.

(sec. 63). In such a case the arbiters merely determine whether the sum awarded was sufficient, or whether any and what further sum should be paid (sec. 64). If they award the claimant a further sum, it must be paid or deposited within fourteen days from the date of the decree-arbitral, after which it may be enforced by diligence, or recovered by action, with costs (sec. 65). If the arbiters find the previous valuation sufficient, they have the costs of the second inquisition in their discretion; if a further sum is awarded, such costs must be borne by the company (sec. 66).

Award of valuator, when final.

It is observable that the statute gives no right to this second inquisition to persons who, after due notice, have failed to appear at the inquisition by a jury. The award of the valuator appointed in such cases is therefore final.

POWER OF REVIEW.

Cases in which proceedings may be quashed.

By sec. 138 of the Act it is declared that 'no proceeding under this or the special Act, or any Act incorporated therewith, shall be quashed or vacated for want of form, nor shall the same be removed by suspension or otherwise into any superior court.' The corresponding section of the English Act (8 Vict. c. 18, s. 145) is exactly the same, except that '*certiorari*' is substituted for 'suspension.' At first sight it might be supposed that these enactments rendered the proceedings final and conclusive. It has, however, been decided that this is not their proper import; and that while the right of review is taken away in all cases where the matters to be inquired into have been fairly before the inquisition, this is not the case where the statutory tribunal has exceeded its jurisdiction. Wherever, therefore, it can be shown that the Sheriff, the arbiters, or the jury have taken upon them to deal with a matter not remitted to them for inquisition, their proceedings may be quashed by suspension or reduction in Scotland, or by writ of *certiorari* in England (*a*). But in applying this rule the Court will take care that, under pretext of impugning the jurisdiction, the provisions of the Act are not evaded (*b*).

(*a*) *Glasgow and Milston Ra. Co.* v. *Nitshill Coal Co.*, 1850, 7 Bell's App. 325, reversing 11 D. 327 (1848); *Caledonian Ra. Co.* v. *Ogilvy*, 1853, 15 D. 410, as reversed 1855, 2 Macq. 229; *South Wales Ra. Co.* v. *Richards*, 13 Q. B. 988; *R.* v. *Sheffield and Manchester Ra. Co.*, 1 Rail. Ca. 537.

(*b*) *R.* v. *Sheffield Ra. Co.*, 1 Rail. Ca. 537; *R.* v. *Lancaster and Preston*

The Court will also interfere if the proceedings are impeached on the ground of malversation or undue interest on the part of the Sheriff (*a*). It must be observed, however, that in all such cases the party seeking review may be estopped by conduct or acquiescence from taking an objection which otherwise would be successful (*b*).

Estimation and apportionment of the compensation.

In estimating the purchase-money or compensation,—whether this be done by the Sheriff, by arbitration, by a jury, or by valuators,—regard must be had not only to the value of the land taken, but also to the damage consequent upon severance or other injury attending the proceedings of the company in the execution of their undertaking (sec. 61). In England, however, it was held that this provision, where it occurred in a special act passed prior to the general statute, was directory only, and not in the nature of a condition avoiding the verdict if not complied with, at least where the point had not been raised at the trial (*c*).

Apportionment.

The amount finally determined as compensation must be apportioned among all parties having interest who appear as claimants. This, however, does not preclude any party having a separate interest from having it ascertained separately (sec. 62) (*d*). This provision has been rigidly interpreted in England; and when the inquisition did not specify the amount of compensation to which each claimant was entitled, the proceedings were declared void, and a new inquiry was directed (*e*). The company cannot object to the consigned money being uplifted by the proprietor until the issue of a reduction of the claim in his favour which they have instituted (*f*).

What if injustice arise from mistake of the jury.

It may happen that, though no excess of jurisdiction, nor any malversation on the part of the presiding officer can be alleged, yet one of the parties has met with injustice through the perverseness or mistake of some of the jury. In such a case it is very doubtful

Ra. Co., 6 Q. B. 759; *R.* v. *Lond. and North-West. Ra. Co.*, 3 E. and B. 443.

(*a*) *R.* v. *London and North-Western Ra. Co.*, 9 L. T. (N. S.) 423; *R.* v. *Justices of West Riding of York*, 5 T. R. 629; *R.* v. *Cheltenham Commissioners*, 1 Q. B. 467; *South Wales Ra. Co.* v. *Richards*, 13 Q. B. 988. See 'Jurisdiction.'

(*b*) *R.* v. *Committee of South Holland Drainage*, 8 A. and E. 429.

(*c*) *London and Greenwich Ra. Co.*, 2 A. and E. 678; *Corrigal* v. *London and Blackwall Ra. Co.*, 5 M. and Gr. 219, 3 Rail. Ca. 411.

(*d*) As, for example, in the case of tenants.—*Falconer* v. *Aberdeen Ra. Co.*, 1853, 15 D. 352.

(*e*) *R.* v. *Norwich and Walton Trs.*, 5 Ad. and E. 563.

(*f*) *Fortune* v. *Edinburgh and Bathgate Ra. Co.*, 1849, 11 D. 531.

if the Court would interfere. In an English case, the Court refused a mandamus to compel the issuing of a new precept by the company to the Sheriff to summon a jury, though the application was made on the grounds of misdirection, of improper rejection of evidence, of the verdict being against evidence, and of the damages being grossly insufficient (*a*).

APPORTIONMENT AND APPLICATION OF COMPENSATION-MONEY.

Procedure where claimants are possessed of a qualified interest only.

If the claimant possess the lands in fee-simple, and labours under no legal disqualification, he of course is the proper person to receive payment of the sums awarded; but as the Act enables persons possessing merely a qualified or partial interest to convey, it also makes special provision for the application of the purchase-money or compensation in such cases.

The following are the parties falling under these provisions:—Corporations; heirs of entail; liferenters; married women seised in their own right, or entitled to any interest out of land; husbands representing their wives, or possessing in courtesy; guardians for pupils and minors, for lunatics, or others under disability; and judicial factors, trustees, executors; and generally any persons whose interest being qualified, are only entitled to convey by force of the statutory provisions.

Application where compensation to such persons amounts to £200 and upwards.

If the compensation payable to such persons, either for lands or consequential or permanent damage, amounts to or exceeds £200, it must be consigned in a chartered or incorporated bank, until it can be applied to one or other of the following purposes, under authority of the Court of Session (*b*).

1. In the purchase or redemption of the land-tax, or in discharging any debt or incumbrance affecting the lands in question, or other lands settled therewith on the same heirs, or for the same trusts or purposes, or affecting succeeding heirs of entail in such lands, whether created by the entailer, or in virtue of powers given by the entail, or conferred by statute (*c*) (sec. 67).

(*a*) *R.* v. *East. Counties Ra. Co.*, 3 Ra. Ca. 466. See also *R.* v. *London and North-Western Ra. Co.*, 3 E. and B. 475; *Re Stroud*, 8 C. B. 502.

(*b*) When the word bank is used in the Act, it always means one of the incorporated or chartered banks in Scotland (sec. 3).

(*c*) Under the head of debts contracted under statutory authority may

2. In the purchase of other lands, to be conveyed, limited, and settled upon the same heirs, and the like trusts and purposes, and in the same manner as the lands in question (*a*) (sec. 67).

In carrying out this provision, it is declared to be unnecessary to engross verbatim, or to mention specifically in the new titles, the provisions or conditions of the old investiture, but to be sufficient to refer to the old deeds by their dates, and to declare that the new lands are held under the same conditions, trusts, and purposes, and to record the title-deeds containing such general references

be mentioned debts for improvements, under 10 Geo. III. c. 51.—*Marquis of Bute*, 1847, 19 Jur. 414. A party possessing two separate estates, under two different deeds of entail, was found not entitled to apply the price of lands taken from one estate to improvement debts contracted on the other, there having been a slight variance in the destination.—*Cochrane*, 1850, 13 D. 293.

(*a*) From these two provisions it appears that compensation-money, obtained for property under entail, ought to be applied in the first place in payment of debts existing under and authorized by the entail or by statutory provision; and next, if any surplus remains, it ought to be laid out in the purchase of new lands, to be brought under the fetters of the entail in the same manner as those disposed of. No discretion is allowed to the heir in possession to settle or apply the money otherwise than as the Act directs.—*Midland Ra. Co.* v. *Gray*, 1850, 13 D. 410. The word lands includes all kinds of heritage; and it was held that the price of part of a glebe, taken by a company, might be invested in the purchase of feu-duties. —*Presbytery of Ayr*, 1842, 4 D. 630. The lands of a municipal corporation are all held for the same or the like uses; therefore, the price of one part of such lands may be applied in redemption of incumbrances affecting other lands held by the same corporation.—*Ex parte Corporation of Cambridge*, 5 Rail. Cases 204. A decision apparently adverse to this was given in the Scotch case of *Magistrates of Dumbarton*, 1852, 14 D. 673; but its authority is very doubtful. It has been held that the expense of opposing a bill in Parliament for a railway, which was proposed to run through the estate in such a way as to deteriorate its value, ought to be defrayed from the price of the lands sold, the two nearest heirs consenting.—*Campbell*, 1847, 9 D. 397. The Court will not sanction payment of compensation-money to an heir of entail on a bond granted by him over lands which he holds in fee-simple, until an opportunity occurs for a permanent investment, in terms of the Act.—*Innes*, 1848, 10 D. 870. Compensation-money for part of an entailed estate was sanctioned to be applied in extinction of debts caused by improvements made under the Act of George III. c. 51.—*Marquis of Bute*, 1847, 19 Jur. 414; *Muirhead*, 1853, 15 D. 517. See as to application of consigned compensation-money in the case of entailed estates, *Geils*, 1853, 15 D. 520; *Fraser* v. *Lovat*, 1852, 14 D. 916; *Lord James Stuart*, 1855, 17 D. 378; *Wauchope*, 1855, 17 D. 1031; *Earl of Strathmore*, 1856, 18 D. 1212; *Lord Elibank*, 1858, 20 D. 794; *Duke of Hamilton*, 1858, 20 D. 1134, and 21 D. 124. See also upon this subject generally Duncan's Manual, which contains a full *resumé* of all the authorities.

in the Register; yet it is provided that on the first occasion of completing titles, the new lands may be introduced, where they will descend regularly, as part and parcel of the original estate (sec. 73).

3. Such money as is paid for buildings taken or injured by the proximity of the works, is to be expended in removing or replacing such buildings, or in substituting others in their place, as the Court may direct (sec. 67) (*a*).

Lastly, if none of these modes of application present themselves, payment is directed to be made to the party absolutely entitled to the money (sec. 67).

Persons with limited or qualified rights have no power to settle claims for compensation, but as directed by the Act

It must be observed that, in cases falling under the provisions of this section, the claimant seems to have no right to settle claims of compensation otherwise than as directed by the statute. Hence a succeeding heir of entail was held not bound by an agreement made by his predecessor, in terms of which the compensation was settled by way of a feu-duty—no such mode of settlement being mentioned in this part of the statute (*b*).

Temporary consignation in bank.

Until the money can be applied in terms of the statutory provisions, it is retained at interest in the chartered or incorporated bank where it was consigned as already mentioned, or invested in the funds, or laid out in heritable security; and the proceeds are paid to the party who, for the time being, would have been entitled to the rents or profits of the lands (sec. 68). If the money is consigned in any other than a chartered or incorporated bank, as required by the Act, the company will be liable to the party entitled to receive the proceeds in interest at 5 per cent. so long as it remains

(*a*) This at least appears to be the only possible meaning of the clause in the Act, and it is obtained by omitting the word 'or' before the words 'in removing or replacing such buildings.' If the conjunction be retained, the clause seems to be without meaning; and its insertion is the more probably a typographical error, since it does not appear in the corresponding clause of the English Act (sec. 69).

It has been decided that the Act does not sanction the application of the money in this manner, unless the dilapidation has been caused by the act of the company, and compensation has been obtained specially on this account. The Court, however, in the circumstances of a particular case—one of trust—did not apply so strict an interpretation.—*Blair's Trs.*, 1852, 14 D. 496. In England, a small sum of money deposited in court, to be laid out in the purchase of lands to be settled to the like uses, has been ordered to be applied to new erections.—*Ex parte Shaw*, 4 Y. and C. 506.

(*b*) *Midland Ra. Co.* v. *Gray*, 1850, 13 D. 410.

thus improperly invested (*a*). In the case of *Innes* (*b*), the Court, after consultation of both Divisions, intimated that for the future they would not sanction the investing of the money obtained for purchase of entailed lands on other lands held in fee-simple by the heir in possession.

Application of money must be regulated by the Court of Session,

The Court of Session can alone determine and sanction the ultimate application of the money on petition of the party interested. In cases of entail, intimation of this petition is required to be made to the three next him (if so many exist) in the usual manner (*c*). The Sheriff has no authority to grant warrant for uplifting or applying the money (*d*).

where it exceeds £20, but is under £200;

If the compensation-money exceed £20, but be under £200, it may either be consigned in a chartered or incorporated bank, and applied as directed in the former case, or else it may be paid to two trustees named by the party entitled to the rents or profits of the lands by writing under his hand. In case of coverture, infancy, lunacy, or other incapacity of such party, the trustees may be named by the husband, guardian, judicial factor, etc., or trustee. But this last mode of application can only be made when the company approve of it and of the parties named as trustees. The money and its proceeds must then be applied by the trustees in the same manner as money paid into the bank. The sanction of the Court is not necessary (sec. 69).

where it does not exceed £20;

If the money does not exceed £20, it is paid directly to the parties entitled to the compensation; and in case of legal incapacity, to their respective administrators as before mentioned (sec. 70).

where it exceeds £20, and is payable under contract with a party not entitled to dispose of the lands absolutely.

All purchase or compensation-money exceeding £20 payable by the company under a contract with a party not entitled to dispose of the lands absolutely for his own purposes, must be paid into the bank, or to trustees as above directed. The party making the contract cannot retain any of the money for his own uses as a compensation for the lands taken, etc., as a consideration for his not

(*a*) *Methven's Trs.* v. *Edinburgh, Perth, and Dundee Ra. Co.*, 1851, 13 D. 1262.

(*b*) 1848, 10 D. 870.

(*c*) *Sir Samuel Stirling* v. *Edinburgh and Glasgow Ra. Co.*, 1851, 14 D. 206; *Hepburn*, 1852, 14 D. 936; *Gammeil*, 1847, 10 D. 45; *Wauchope*, 1855, 17 D. 1031. See Duncan's Manual, 433.

(*d*) *Edinburgh, Perth, and Dundee Ra. Co.*, 1850, 22 Jur. 573.

opposing the company's bill, or in lieu of accommodation works; but the whole must be deemed to have been contracted to be paid for the benefit of all interested in the lands, whether in possession or expectancy. The Court, however, or the trustees, as the case may be, have a discretionary power to allot to liferenters or others possessing a qualified interest, a portion of the money as a compensation for any injury or annoyance they may sustain from the company's operations, independently of the loss of the lands taken, or of injury to other lands held therewith (sec. 71).

Application where money is deposited in bank in respect of leases, etc.

When money is paid into the bank in respect of leases or other rights in land, less than that of the fee, or in respect of any reversion dependent on such rights, the Court may, on application by the party so interested, direct the money to be invested in such a manner as to give him the same benefit as he would have had from his lease or other limited right (sec. 72).

OBLIGATIONS ON OWNER, ETC., WHEN MONEY HAS BEEN PAID OR CONSIGNED.

Obligations on owner, trustees, etc.

When the compensation-money is tendered to the owner, consigned in bank, or paid to trustees, as the case may be, the party empowered to convey is bound to do so as the company may direct: on his failure to do so, the Act provides the following remedies:—

Remedy where owner refuses to receive the money or to convey.

1. If a party absolutely entitled to the money refuse to receive it, and to grant a conveyance as required, or to discharge an incumbrance connected therewith, or be unable to do so, or if he be absent from the kingdom, cannot be found, or fail to appear at the inquest, the company may deposit the money in bank to account of the party (describing him as accurately as they can), and to remain subject to the control of the Court (sec. 75). Upon this, the cashier is required to give the company or their agent a receipt, stating for whose use and for what purchase the deposit is made. They may then expede a notarial instrument, describing the lands, and stating the circumstances under which, and the names of the parties to whose credit, the deposit has been made; and this document, when stamped as a conveyance, vests the company with the lands, entitles them to immediate possession, and when registered has the same

effect as a registered conveyance (sec. 76) (*a*). On petition by the party interested, the Court may summarily direct the money to be invested in the funds, and laid out on heritable security, may order its distribution among those interested, and make such other order as the circumstances seem to require (sec. 77). Until the contrary be shown to the satisfaction of the Court, the parties in possession at the date of the purchase are deemed to be the owners; and they and all claiming under them, or consistently with their possession, are deemed entitled to the deposited money and its proceeds (sec. 78) (*b*).

Remedy where money is consigned because no one has an absolute right to receive it.

2. When the money has been deposited in bank by reason of the parties interested in the lands not being entitled to receive it, from legal incapacity, or possessing only a qualified interest, and the party empowered to convey refuses to do so as the company may direct, or fails to produce a valid title, the company may obtain investiture as before by notarial instrument, which gives them right to immediate possession. This instrument, which must describe the lands and state the purchase, the names of the parties, the deposit made, and the failure to grant a proper conveyance, has, when duly stamped and registered, the same effect as a registered conveyance (sec. 74).

Powers of Court as to payment of expenses by the company.

In all cases of monies deposited in bank, except where the deposit has been made in consequence of refusal or inability to convey or give a proper title as before mentioned, the Court may order the expenses of the following matters, and all reasonable expenses relative thereto, to be paid by the company:—

The expenses of the purchase or taking of the lands, and of all matters connected therewith, except such expenses as are otherwise provided for in the Act; the expenses of the investment of the price or compensation in Government or real securities, of their reinvestment in the purchase of other lands, and of re-entailing such lands, with all that is incident thereto; the expenses of obtaining the proper orders for any of these purposes, and of orders for the pay-

(*a*) This mode of completing the titles is incompetent when the seller is able and willing to convey.—*Graham* v. *Caledonian Ra. Co.*, 1848, 10 D. 495.

(*b*) In *Methven's Ex.* v. *Edinburgh, Perth, and Dundee Ra. Co.*, *supra*, it was held that when a party was in possession at the date of the taking of the lands, it falls upon the company to show that he has no title, and that if they fail in this they must pay him the damages or price. When, however, they are in doubt as to the validity of title offered, their remedy is to consign in terms of sec. 75 of the Act.

ment of the dividends and interest of the securities upon which such monies are invested, and for payment of the principal of such monies, or of the securities in which they are invested, and of all proceedings relative thereto, except such as are occasioned by litigation between adverse claimants. But it must be observed, that the expense of one application only for reinvestment in land is allowed, unless the Court think it to be for the benefit of the claimants that the monies should be invested in the purchase of land in different sums, and at different times, when it may order such additional expenses to be paid by the company (sec. 79) (*a*).

Forms of conveyance.

Forms are annexed to the Act for feus and conveyance of the lands purchased. They are simple in themselves, and should be departed from as little as possible. The introduction of additional clauses *in majorem cautelam* cannot make the title stronger, but may occasion much unforeseen embarrassment. If registered in the Particular or General Register of Sasines within sixty days from the last date they bear, such feus and conveyances give a complete and valid feudal title to the company (sec. 80).

Statutory forms seem to apply to lands acquired under the compulsatory power only.

It would seem, however, that these forms of conveyance apply only to lands taken under the special and compulsatory powers which it is the object of the Act to confer and regulate. Lands acquired

(*a*) The following cases have been decided under this section of the Act:—A railway company taking lands, and consigning the price in bank, have been found liable in the expense of applying the money in paying off the cost of improvements on an entailed estate made under the Montgomery Act.—*Grant* v. *Edinburgh and Dundee Ra. Co.*, 1851, 13 D. 1015. When the price of lands taken by a railway company was to be invested in other lands to be entailed in lieu of those taken, the company were found liable not only in the expenses of the proceedings, and of making the new entail, but also in those incurred by the heir in possession, in obtaining an entry with the superior of the lands purchased.—*Marquis of Titchfield* v. *Glasgow and South-West. Ra. Co.*, 1853, 15 D. 908. An heir of entail is entitled to the expense of the application to uplift money consigned as the value of the lands taken, but not to the expense of constituting his right against the other heirs to the money.—*Erskine* v. *Aberdeen Ra. Co.*, 1851, 14 D. 119. Where an heir of entail petitioned the Court to have the price of lands taken by a railway company applied in payment of permanent improvements, in terms of the Entail Amendment Act, he was found entitled to the cost of the petition, and of the warrant for uplifting, but not to the expense of constituting his right to the money against the other heirs of entail.—*Lord Torphichen* v. *Caled. Ra. Co.*, 1851, 13 D. 1400. In the circumstances of one case, it was held that a railway company was liable for the expenses of two applications to the Court for the cost

for other purposes by the company would seem not to fall under this category, and the title to them must be taken to the corporation, or to trustees for the company (as the case may be), in the usual forms. The Act also gives the option of completing in this manner the titles to lands acquired under the compulsatory powers (sec. 80).

Costs to be borne by the company.

The whole expenses of the conveyance, including those 'of establishing the title to such lands,' 'and all other reasonable expenses incident to the investigation of such title,' must be borne by the company (sec. 81). In interpreting this provision, the Court of Session have held that the expression 'establishing the title to such lands' does not refer to the expense of making up titles to his property in the person of the owner, but applies merely to that of completing them in favour of the company; completing his title by the owner having to be done sooner or later, whether the lands were required for company purposes or not (*a*).

In case of dispute, the Lord Ordinary determines the amount of costs.

The amount of expenses in case of dispute is determined and decerned for by the Lord Ordinary on a summary petition. It has been doubted whether his judgment is final; but review is always competent where, in dealing with expenses, he travels out of his jurisdiction (*b*). The costs decerned for may be recovered in the ordinary way, or by poinding and sale, as provided for in sec. 52. The

of reinvesting consigned money.—*Grant* v. *Edinburgh and Dundee Ra. Co.*, 1851, 13 D. 1015. See as to this also, *Lord Elibank*, 1858, 20 D. 794. An arbiter ordained a company to deposit the sum he found due for lands taken, and the proprietor to grant a disposition, which he failed to do. The company having consigned, completed their title under sec. 76 of the Act; but it was held notwithstanding, that the expense of an application to uplift the money was a valid charge against the company.—*Moncrieff* v. *Edin. and Glas. Ra. Co.*, 1857, 19 D. 283. A railway company acquired part of an entailed estate, and they were informed that the lands were burdened with debts, and that they would be liable in the expense of new securities rendered necessary by taking the lands. The holder of a redeemable bond of security having insisted on a bond of corroboration over other lands purchased with the money paid by the company, it was held that they were liable in the expense of the bond.—*Primrose* v. *Caled. Ra. Co.*, 1848, 11 D. 236. A railway company having agreed with a proprietor to pay him a certain sum 'in full of all claims for price of land, agricultural and severance or other damage,' were found liable in the costs of reinvesting the same, with the expenses of entailing, and of the necessary application to the Court, though the price paid far exceeded the value of the lands under the statutory valuation.—*Earl of Mansfield* v. *Glasgow and Carlisle Ra. Co.*, 1850, 13 D. 235.

(*a*) *Graham* v. *Caledonian Ra. Co.*, 1848, 10 D. 495.

(*b*) Same case.

expenses of taxation, and of or incident to the application to the Lord Ordinary, must be borne by the company, unless upon such taxation one-sixth be disallowed; in which case they fall upon the other party, and as ascertained by the Lord Ordinary, are deducted by him in his decerniture for the general expenses (sec. 82).

ENTRY ON LANDS.

Payment of price must precede entry.

The company are not entitled to enter on the lands required for their undertaking until they have paid or consigned the price (sec. 83), except with consent of owners and occupiers; and when they have entered with such consent, their possession cannot afterwards be disturbed. The recourse is to enforce payment of the compensation (*a*).

Exception where entry is for purposes of surveying.

They may, however, without previous consent, enter upon the lands for the purpose merely of surveying, ascertaining the nature of the soil, etc., and setting out the line of the works, on giving not less than three and not more than fourteen days' notice to the owners or occupiers (sec. 83) (*b*). But in order to this, a bargain must have been already concluded with the owner for the purchase, though the price may not have been fixed or paid (*c*). And it may here be observed, that until they have obtained their special act, the company have no right whatever to take or enter upon any lands (*d*).

Procedure where entry is sought for other purposes.

If the company are desirous of commencing more important and permanent operations before the purchase-money has been ascertained and paid or deposited, they may do so on depositing in bank the sum claimed by the owner, or fixed by a valuator nominated by the Sheriff as before mentioned if the owner cannot be found (*e*); and also, if required, on granting a bond under the hand of their secretary, with two sufficient securities approved of by the Sheriff in case the parties differ, for a sum equal to that deposited, for payment or consignation of the amount ultimately fixed as the real

(*a*) *Hudson* v. *Leeds Ra. Co.*, 16 Q. B. 796.

(*b*) Sinking pits and making excavations fall under this provision. *Fleming* v. *Caledonian Ra. Co.*, 1847, 9 D. 792, 19 Jur. 319.

(*c*) *Dalgleish* v. *Stirling and Dunfermline Ra. Co.*, 1847, 9 D. 505, 19 Jur. 208.

(*d*) *Dalgleish* v. *Stirling and Dunfermline Ra. Co.*, *supra*.

(*e*) Secs. 56 *et seq*.

compensation, together with the interest thereof at 5 per cent., until it is paid or deposited (sec. 84). Under this provision it has been decided that an incorporated company, such as a railway, is bound to find the two securities if required, and that a bond without these is not sufficient (*a*). It has also been held that the deposited money is only intended to cover the purchase-money, or compensation claimed by the parties interested, and not expenses (*b*).

Application of deposited money.

On being paid into bank, the money is placed to account of the parties interested, subject to the control of the Court; and the cashier grants a receipt to the company or their agent, specifying for what purpose and to whose credit the money has been paid (sec. 85). The deposit remains as a security for performance of the bond; but on petition from the company, it may be ordered to be reinvested in the public funds, or on heritable security, and accumulated. When the conditions of the bond have been implemented, the deposit or accumulated sum is ordered on petition to be repaid to the company; but if the conditions have not been strictly implemented, the Court may order it to be applied for the benefit of the parties for whose security it has been deposited (sec. 86) (*c*).

Penalties consequent on wrongous entry.

If the company or their contractors wilfully enter upon the land without consent, or without payment or deposit in security as above, they incur a penalty of £10 exclusive of damage, and both may be recovered before the Sheriff. For every day they continue in wrongful possession after this conviction, the forfeit is £25, which, with expenses, may be recovered in any competent court. It is sufficient, however, to save them from these penalties, that they have paid or deposited as required by the statute, for behoof of any one whom they *bona fide* believed to be the owner, though it should afterwards turn out that they were in error (sec. 87).

Interpretation of these provisions.

These provisions being penal, are strictly interpreted; but the proviso in favour of the company receives a liberal interpretation (*d*). They have been held in England not to deprive the owner of the

(*a*) *Radcliffe* v. *Glasgow and Dumfries Ra. Co.*, 1847, 9 D. 1462, 19 Jur. 640.

(*b*) *Edinburgh, Perth, and Dundee Railway Company* v. *Hope*, 1854, 16 D. 1041.

(*c*) See, as to this provision, *ex parte Stevens*, 5 Ra. Ca. 437; *ex parte Great North. Ra. Co.*, 5 Ra. Ca. 269; *ex parte South Wales Ra. Co.*, 6 Ra. Ca. 151.

(*d*) *Per* Pollock, C. B., in *Hutchison* v. *Manchester, etc., Ra. Co.*, 3 Ra. Ca. 748.

common law remedy of an action of trespass against the company, to which, however, compliance with the statutory proviso as to payment and deposit may be pleaded (*a*).

Decision of Sheriff not conclusive.

The decision of the Sheriff in an action for the penalties above mentioned is not conclusive as to the right of entry on the lands by the company (sec. 88).

In case of the company being refused possession or prevented from entering, they are empowered to force entry by petition to the Sheriff. The expenses of this proceeding must be borne by the party wrongfully refusing entry, and they are retained out of any compensation-money payable to such party; and if none such be due, or if it prove inadequate, they or their excess may be recovered by poinding and sale (sec. 89).

Party cannot be required to sell a portion, if he be willing to sell the whole of a building.

A party cannot be required to sell or convey part of a building, if he be willing to convey the whole (sec. 90) (*b*).

PORTIONS OF INTERSECTED LAND.

When company may be compelled to take fractional parts of intersected lands.

If any lands, not situated in a town or built on, are so cut through and divided by the works as to leave on either or both sides less than half an acre, the company may be compelled to purchase this fractional part. If, however, the owner have other land adjoining into which it can be thrown, the company can only

(*a*) *Ramsden* v. *Manchester South Junction Ra. Co.*, 5 Ra. Ca. 552.

(*b*) This provision, which is identical in the Scotch and English Acts, has received a very liberal construction from the English courts. Thus, it has been held that gardens attached to houses are parts of the houses—*Cole* v. *West London and Crystal Palace Ra. Co.*, 27 Beav. 242; *St Thomas' Hospital* v. *Charing Cross Ra. Co.*, 1 Jo. and H. 400; *Alexander* v. *West End of London and Crystal Palace Ra. Co.*, 31 Law Jour. (Ch.) 500; *Dakin* v. *London and N.-W. Ra. Co.*, 3 De G. and S. 420; and so also strips of land similarly attached—*Sparrow* v. *Oxford and Worcester Ra. Co.*, 2 De G. M. and G. 94; *Grosvenor* v. *Hampstead Junct. Ra. Co.*, 1 De G. and J. 446. But a strip of land on the other side of a road or walk, and used for pleasure only, has been held not to be part of a house.—*Fergusson* v. *London, Brighton, and South Coast Ra. Co.*, 33 Law Jour. (Ch.) 29; *Pulling* v. *London, Chatham, and Dover Ra. Co.*, 33 Law Jour. (Ch.) 505. When a railway passes under a house or manufactory by means of a tunnel, the company have been thought bound to take the whole premises.—*Sparrow* v. *Oxford and Worcester Ra. Co.*, *supra*; *Ramsden* v. *Manchester Ra. Co.*, 1 Ex. 723, 5 Ra. Ca. 552; *Piper* v. *Hammersmith and City Ra. Co.*, Q. B. M. T. (1864); *Croft* v. *Lond. and N.-W. Ra. Co.*, 3 Best and S. 436. When the company seek

be required to unite the two parts into one by levelling fences, and by soiling in a workmanlike manner (sec. 91) (*a*).

When company may insist for a sale.

On the other hand, the company may insist for a sale, if the land be so divided as to leave a piece of less extent than half an acre, or of less value than the cost of making such a bridge or other communication as they are bound by statute to erect, and if the owner have no adjacent lands into which the fractional piece might be thrown (*b*). All questions as to the value of such piece of land, or the cost of making communications, are determined in the same way as other questions of disputed compensation; and this, if either party require it, may be done when the value of the lands taken is assessed by the Sheriff, jury, or arbiters, as the case may be (sec. 92).

COMMON LANDS.

Appointment of committee.

The compensation to be paid to those interested in commonty lands is determined by agreement between the company and a committee of the commoners. This committee are deemed to be the proprietors of the commonty rights in all proceedings affecting the valuation. The members of the committee must not exceed five in number; they are chosen at a meeting of all interested, whether the interest be that of property, servitude, or other less

a part, they cannot be required to take any greater portion of the house less than the whole.—*Pulling* v. *London, Chatham, and Dover Ra. Co.*, *supra*. Negotiations for sale of a part do not prevent the owner from afterwards insisting that the whole shall be taken. —*Gardner* v. *Charing Cross Ra. Co.*, 31 Law Jour. (Ch.) 181. But the company may, it should seem, revoke their notice, if, desiring only a part, they are required to take the whole.—*R.* v. *Lond. and S.-W. Ra. Co.*, 5 Ra. Ca. 669; *King* v. *Wycombe Ra. Co.*, 29 Law Jour. (Ch.) 462. The provisions under consideration have been held to apply to leasehold interests.—*Pulling* v. *Lond., Chatham, and Dover Ra. Co.*, *supra*.

It may be noticed, that where a trust settlement contained a special bequest of a house, which was afterwards during the testator's life conveyed to a railway company under their aggressive powers, it was held that the price did not fall to the legatee named in the deed.—*Chalmers* v. *Chalmers*, 1851, 14 D. 57.

(*a*) See, as to meaning of the word *Town*, *R.* v. *Cottle*, 16 Q. B. 412; *Elliot* v. *South Devon Ra. Co.*, 2 Ex. 725, 5 Ra. Ca. 500.

(*b*) This provision is not confined to land situated in a town; but it does not apply to ground which is valuable otherwise than as mere land, *e.g.* giving access to the sea.—*Falls* v. *Belfast Ra. Co.*, 11 Irish L. R. 184, and 12 *ib.* 233; *East. Counties Ra. Co.* v. *Marriage*, 31 L. J. (Ex.) 73; *Falls* v. *Belfast and Ballymena Ra. Co.*, 12 Irish L. R. 233.

important right. The company call this meeting by public advertisement and notice, as directed in the Act; and the majority, provided five (if there be so many having interest) be present, binds all absent parties (secs. 93, 94).

Powers and duties of committee.

The committee so chosen agree with the company as to compensation for extinction of the commonty rights, and they receive the sum agreed on; their receipt, or that of any three of their number, being an effectual discharge to the company. They afterwards apportion the compensation-money among the parties interested; but with this the company have no concern, nor are they liable for misapplication or non-application of such money (sec. 95). If the committee and company cannot agree, the compensation is determined as in other cases of disputed compensation (sec. 96).

What if committee is not appointed?

But if, being duly convened, no effectual meeting of those interested takes place, or if, taking place, it fail to appoint a committee, the compensation falls to be determined by a valuator appointed by the Sheriff, as provided in cases where the parties interested cannot be found (sec. 97).

Procedure by company to obtain possession.

Upon payment or deposit, as the case may be, of the compensation-money, the company may execute a disposition by notarial instrument, as provided in the purchase of ordinary lands, and thereafter the commonty lands vest in the company, discharged from all commonty rights or burdens, and the company are entitled to immediate possession. The Court of Session may on petition order payment of the deposited money, or deal otherwise with it for the benefit of all interested as may seem fit (sec. 98).

Decisions on this branch of the statute.

The following decisions in relation to the foregoing clauses as to the rights of commoners may be here noticed:—

In a suspension and interdict at the instance of a railway company against following out to trial or otherwise enforcing a notice of claim alleged to have been given on behalf of a number of persons entitled to a piece of common required by the company, on the ground that there being a vacancy in the statutory committee of five of the persons interested, the notice given by the remaining four was ineffectual, objections to the competency of the application were repelled, and the note was passed and interdict was granted to try the question (*a*). In the same case the question

(*a*) *Fife and Kinross Ra. Co.* v. *Deas*, 1859, 21 D. 187.

was raised, but not decided, whether, in serving notice of a claim under the Act by a committee of feuars, the concurrence of all the members of committee was necessary (*a*).

A railway company acquired a portion of the public links of a royal burgh, on which they constructed that part of their railway which passed through the links. They afterwards called a meeting of the magistrates and council, and of the burgesses and heritors of the burgh, 'in terms of and for the purposes specified in the 93d, 94th, and 95th sections of the Lands Clauses Act,' with reference to the company's acquiring an additional portion of the links for extraordinary purposes in connection with the railway. A note of suspension and interdict was presented by one of the heritors of the burgh against the company proceeding to acquire the additional portion, and against the magistrates and council selling or agreeing to sell the same. The Court passed the note, but refused the interdict (*b*).

MORTGAGES, LIENS, OR OTHER RIGHTS IN SECURITY AFFECTING LANDS.

When such rights may be acquired by the company.

Interests of this kind may be acquired by the company when they affect lands taken for the purposes of the special act, though they have not previously acquired the lands themselves, though the holder of the security be a trustee for others, though he should not be in possession of the lands affected by it, and though the security affect other lands jointly with those required for the undertaking.

Procedure by the company.

In order to acquire such securities, the company may adopt one of two courses,—they may pay or tender to the holder the principal and interest due on his security, with his expenses and charges, if any, and also six months' additional interest; and thereupon the holder is required immediately to convey his interest to the company, or as they may direct: or they may give written notice to the holder that they will pay off the principal and interest at the end of six months from the date of the notice; and in that case, on the expiration of the notice, or at any intermediate period of the company, tender or pay to the holder the principal and interest

(*a*) 21 D. 1205.

(*b*) *Cunningham* v. *Edinburgh and Northern Railway Company*, 1847, 9 D. 1469.

which would become due at the end of the six months, together with the expenses and charges, if any. The holder is then required to convey or discharge his interest in the lands covered by the security to the company, or as they shall direct. If, again, the owner of the lands burdened with the security gives six months' notice of his intention to redeem the same, the holder, on tender or payment of the principal and interest, as before, by the company, must convey or discharge in their favour, as above (sec. 99).

What if holder refuse to convey?

If the holder of the security fails to convey or discharge, as required, on payment or tender, or if he fails to adduce a good title to his security, the company may proceed as follows: they may consign in bank the principal, interest, and expenses which would be due at the end of the six months, and may then expede a notarial instrument, duly stamped, as before directed in the case of purchase of lands (sec. 76); and thereupon the interest of the holder, or of his trustees, or of those for whom he is trustee in the lands mortgaged, vest in the company, and they are entitled to immediate possession if the holder were entitled to possession (sec. 100).

What if the sums received exceed the value of the lands mortgaged?

It may happen that the principal, interest, and expenses exceed the value of the lands mortgaged. In this case the holder of the security is not entitled to receive full payment of such sums from the company; but the value of the lands being ascertained by agreement, or as provided for in cases of disputed compensation, such value or compensation is paid to the holder of the security as satisfaction of his claim in so far as the company are concerned, and they are then entitled to conveyance and possession by disposition or notarial instrument as in the other cases above specified, the holder still retaining his claim for the balance due under his bond against the granter (secs. 101, 102). If a part only of the lands over which the security extends be required by the company, and if this part be of less value than the principal, interest, and costs secured, and the holder do not consider the remaining part of the lands a sufficient security for the money charged thereon, or be unwilling to discharge the part required, and if the company be unwilling to advance the debt on an assignation, the Act provides that the value of the part taken, together with the compensation for severance, shall be ascertained as in other cases, and that on payment or tender of the ascertained value or compensation the

holder shall convey as before, or in default the company may complete their title by notarial instrument as in other cases, leaving to the holder his claim (for any balance) against the granter of the security, which may still remain unsatisfied (secs. 103, 104).

Procedure where the lands cannot be redeemed till elapse of a specified time.

When, by the deed creating the security, the holder is not bound to accept payment of the principal until elapse of a specified time, the company must pay the holder, over and above the principal, interest, and ordinary costs, such additional expenses as may be incurred for reinvestment of the sum paid off. If disputed, these expenses may be taxed, and they may be recovered in the same way as the costs of conveyances (sec. 105). If the sum paid off cannot be reinvested at the same rate of interest in consequence of a change in the money market, the company must give the holder compensation, which is ascertained as in other cases of disputed compensation; and until this be paid or tendered, they cannot take possession of the lands (sec. 106).

FEU-DUTIES, GROUND-ANNUALS, CASUALTIES OF SUPERIORITY, ETC.

Company may enter without redeeming such charges.

The company may enter upon and possess the lands subject to such charges without redeeming them, provided they pay the annual sums, and otherwise fulfil all the obligations prestable in virtue of such charges. They may, however, be called upon by the party entitled to the charges to redeem them (sec. 108).

When part only of the lands charged is taken.

If part only of the lands affected by such charges is required by the company, the apportionment of any such charge may be fixed by agreement, but otherwise it must be settled by the Sheriff. If the remainder of the lands taken be sufficient for such charges, the party entitled thereto may, with the consent of the owner of the lands, discharge the portion of them taken by the company on consideration of the remaining part being exclusively subject to the whole charges (sec. 109). On payment or tender of the ascertained compensation, the company may complete their title by conveyance or notarial instrument as before, and thenceforth the charges are extinguished (sec. 110).

Effect of the discharge.

When the lands taken by the company are discharged from charges or incumbrances to which they were jointly subject with

other lands, the party entitled to the charge has the same rights and remedies over the last-mentioned lands for the whole or the remainder of the charge as he previously had over the whole lands subject to such charge; and the company, if required, must execute a probative deed or instrument declaring what lands originally subject to such charge have been purchased in virtue of their special act, what portion (if any) of such charge has been discharged, how much continues payable, and if the lands taken have been entirely discharged, that the remaining lands are thenceforward to continue exclusively liable for the charge. This instrument must be executed at the cost of the company, and is competent evidence of the facts it certifies (sec. 111).

LANDS SUBJECT TO LEASES.

Tenants for years.

Where lands are let under lease for a term of years, and a part of them is required to be taken by the company before expiration of the lease, the rent must be apportioned between the part required and the residue, either by agreement or by the Sheriff; and after such apportionment the lessee remains liable for such part of the rent only as attaches to the residue, the landlord retaining his rights and remedies as to this portion as before (sec. 112).

Every such lessee is entitled to compensation from the company for severance or other injury consequent on execution of the works (sec. 113).

Tenants from year to year.

Tenants from year to year, if required to give up possession to the company, are entitled to compensation for their unexpired term of possession or other interests, and for allowances which they could claim against incoming tenants; and also, when part only is taken, to compensation for severance, etc., as before. In case of disagreement, the amount is determined by the Sheriff (sec. 114).

Leases must be produced.

Persons claiming compensation as being tenants for more than a year must produce, if required, their respective leases or other legal evidence of their alleged rights; otherwise they will be deemed tenants from year to year, and their compensation assessed accordingly (sec. 115) (*a*).

(*a*) The following decisions on this branch of the statute may be adverted to. The tenant as well as the owner of lands taken by a company is en-

LANDS OMITTED TO BE PURCHASED.

Procedure to ascertain value of lands taken, but omitted to be purchased.

As already mentioned, the aggressive powers of the company to force sale of lands cannot be exercised after the period prescribed in the special act as the term of their endurance; and if none is prescribed, not after three years from the passing of the special act (sec. 116). But if, through mistake or inadvertency, lands have been entered upon during the prescribed period, and have been omitted to be purchased or paid for till after its elapse, the company will be entitled to retain possession, provided that within six months after a claim for compensation has been made and admitted, or within six months after it has been judicially sustained, the company pay the amount agreed on or ascertained in the usual way, with full compensation for the mean profits. The compensation both for the purchase and the mean profits must be estimated as though the company were still to enter on the lands (sec. 117). But the value of the lands themselves must be taken as they stood at the date of actual entry, and no regard can be had to subsequent improvements (sec. 118). The expenses of the procedure when

titled to give notice of his claim for compensation to the company, and to require them to call upon the Sheriff to summon a jury to assess the amount of compensation; and in default of their doing so, he is entitled to recover the amount claimed by him in terms of the 36th section. The procedure authorized by that section is competent in the case of lands entered on by them, as well as in the case of lands which they have taken. When, however, a tenant intimates a claim for compensation, he must state it in such a way that the claim may be at once paid, and cannot claim a series of annual payments during the currency of the lease.—*Falconer* v. *Aberdeen Ra. Co.*, 1853, 15 D. 352. A jury being empannelled to assess the sum due to a landlord, through whose lands a railway passed, 'as the price or value of the lands, and of his interest therein, and as compensation for the damage to the lands on account of the formation of the railway,' appointed a road to be made for the proprietor's accommodation, valued the land taken for the railway and occupied by the road at a certain number of years' purchase, fixed the damage by severance at a certain rate per acre, and allowed a sum as compensation for the inconvenience occasioned by a level crossing, and for the burden of keeping the road in repair. The lands were let under lease; and a question having arisen as to the right of the tenant, it was held by the whole Court that the landlord was bound to relieve the company of the tenant's claim for reduction of rent, but not for damage by severance.—*Hunter* v. *North British Ra. Co.*, 1849, 12 D. 37. Under a statutory submission, the tenant of a farm obtained, before formation of a line of railway, an award against the company for intersectional damage;

the compensation is disputed must be borne by the company, and are settled by the proper officer of the Court where the litigation takes place (sec. 119).

LANDS TAKEN BEYOND WHAT IS REQUIRED FOR THE PURPOSE OF THE UNDERTAKING.

How such lands must be disposed of.

Within the period prescribed for the purpose, and if no time is fixed, within ten years from that prescribed for the completion of the works, the company must sell and dispose absolutely of all lands acquired and found superfluous, and must apply the funds so realized to the purposes of the special act. Any such superfluous lands remaining unsold after the period for disposing of them has elapsed, vest in and become the property of the owners of the adjacent lands, in proportion to the extent of their said lands (sec. 120).

Offer of pre-emption.

Before disposing of such superfluous lands, the company must first offer them to the person entitled to the lands from which they were severed; and if such person refuse to purchase, or cannot be found, the like offer must be made to the adjacent proprietors,

and after the line was completed he claimed special severance damage for injury to pasture grounds, alleging that this claim did not fall under the former submission, seeing the damage had not then emerged. It was held, that the question of whether the claim was covered by the former award was for the Court and not for a jury to determine; and that, according to the policy and intendment of the general Railway Acts, such claims fell under the former submission; for since the damage might have been foreseen, it must be held to have been foreseen. —*North British Ra. Co.* v. *Hay*, 1852, 14 D. 832. A tenant under an arrangement with a railway company received £5000 as compensation for injury to lands, and undertook to make a branch for the conveyance of minerals. Afterwards, without making the branch, he threw up the lease in virtue of a provision which it contained. The House of Lords held, affirming the judgment of the Court of Session, that there was no privity of contract with the landlord, that he could not plead *jus quæsitum tertio*, and that he had no claim to the £5000, either as applying to the remaining years of the lease, or for the purpose of making the branch railway.—*Peddie* v. *Brown and Co.*, 1857, 20 D. (H. of L.) 1, 3 Macq. 65. The yearly tenants of a dyework took steps to compel a railway company to settle by arbitration the damage due for the temporary pollution of a water-course, consequent on the construction of works at a considerable distance above the lands and works of the claimants, none of which were taken or injured. The Court held that the proper mode of ascertaining the compensation was by application to the Sheriff under sec. 114 of the Lands Clauses Act.—*Caledonian Ra. Co.* v. *Barr*, 1855, 17 D. 312.

provided they are capable of entering into the contract. When more than one person is entitled to this right of pre-emption, the offer must be made to them in succession, in such order as the company may think fit. These provisions, however, do not apply to lands situated within a town or used for building purposes (sec. 121).

Procedure if offer not accepted.

If, after the offer of sale, the parties before mentioned decline to accept it, or fail to signify their acceptance for six weeks, the right of pre-emption ceases; and a declaration in writing made before the Sheriff, narrating the offer and the circumstances of declinature, or that the parties could not be found, or were incapable of entering into the contract, as the case may be, is legal evidence of the facts it certifies (sec. 122).

Ascertainment of values.

If the company and the parties entitled to the right of pre-emption cannot agree on the price, it must be determined by arbitration, the relative costs being in the discretion of the arbiters (sec. 123).

Procedure to give investiture.

Upon payment or tender of the ascertained price, the company are required to execute a conveyance under their common seal if a corporation, and if not incorporated, under the hands of the promoters of the undertaking, or of any two of the directors or managers acting with the authority of the body. This document vests the purchaser with the lands purchased, and a receipt attested as above is a sufficient discharge for the price (sec. 124). The technical word '*dispone*,' used in the conveyance, operates as a clause of absolute warrandice against the company, except in so far as it may be restrained or limited by express words (sec. 125).

MANNER OF HOLDING LANDS, AND RIGHTS OF SUPERIORS.

General observations.

The provisions of the Lands Clauses Act upon this important subject are not embodied in consecutive sections, but will be found scattered over the whole statute. They appear to be comprised in secs. 8, 10, 11, 12, 80, 83, 107, 108, 109, 110, 111, 125, and 126; but to ascertain their real import, it is obviously necessary that they be read and considered in connection with each other, and with the other provisions of the Act, and that its general scope and purposes be steadily kept in view. Yet, as the phraseology employed is not

strictly technical, and seems not unfrequently to be capable of more than one construction, it is to be feared that until the way has been cleared by decided cases, the most mature consideration will not furnish an interpretation which shall not be attended with difficulties and open to objections. The views which are now to be submitted are those at which the author has arrived after many careful perusals of the Act; but though he finds that they are in conformity with the general practice of conveyancers, he submits them with great diffidence, as by no means certain that they are exhaustive of the statutory provisions.

Apparent meaning of the statutory provisions.

The Act appears to contemplate that all lands acquired by the company, for the purposes of its undertaking, shall be held, as far as possible, in conformity with the principles of feudalism, as these are understood in the law of Scotland; but it also furnishes certain machinery, whereby, without dissolving the feudal relation, the duties and casualties of superiority may in certain cases be purchased up and extinguished, and introduces certain expeditious and simple methods by which the company may obtain investiture without the necessity of complying with all the formalities required in ordinary cases, and which, before the passing of the Titles to Lands Acts, were greatly more cumbrous than they have since become. For these purposes, it seems to provide as follows:—

Where possessor of land is entitled to dispone absolutely.

If the possessor of the lands acquired be entitled to dispose absolutely of the *dominium utile*, the company may agree to hold under him for payment of a feu-duty, to be charged on the tolls or rates, if any, and otherwise secured, as may be arranged (secs. 10 and 11). Registration of the conveyance will in this case complete the feudal right (sec. 80). If, however, the conveyance contain a precept of sasine according to the old forms, the title may be completed by infeftment and registration; but this method has now fallen into entire desuetude, since the Titles to Lands Act has rendered what was an exceptional privilege a right competent in all cases.

Where only a qualified right.

Where, again, the person empowered by the statute to convey has only a qualified right, it seems to be intended that the conveyance shall be so conceived as to enable the company to hold directly of the superior; and the title will be completed by registration, and afterwards, when necessary, obtaining confirmation by the superior.

When, in such case, the conveyance contains the double manner of holding, with the usual clauses for rendering it effectual, it is provided that the title may be completed by resignation or confirmation, or by the equivalent procedure introduced by the Titles to Lands Act. But it must be observed that the existence of such clauses does not prevent it being completed by direct registration of the conveyance (sec. 80). In the case of the *a me* holding, the consideration to the seller may either be a price, or may take the form of a ground-annual (sec. 10). In such cases, the casualties must be provided for by a single payment in name of an ascertained compensation, or by such other arrangements as are commonly made when corporations are admitted as vassals (secs. 108, 117).

When charges and casualties are purchased up.

But it is provided, that the company may in all cases, with the consent or on the requisition of the superior, redeem the feu-duties and casualties of superiority, by making payment of a compensation to be agreed on or ascertained by the Sheriff; and when this is done, the superior must discharge the lands taken of such incumbrances, or otherwise the company may attain the same end by a notarial instrument. When the lands taken form only a part of those held by the same titles under one superior, the redemption of the feu-duties and casualties appears to be compulsatory, with the view apparently of preventing the complications of title which would otherwise arise (*a*). In both these cases, if an entry has not been already taken, it is declared to be unnecessary, and the company's title is completed by recording the conveyance.

The lands are not disfeudalized, and consequences of this doctrine.

It must not, however, be supposed that the lands so acquired are entirely relieved from the fetters of the feudal system, or that the rights of the superior whose charges and casualties have been redeemed, are thereby in theory brought to an end. Though the Act declares a formal entry to be unnecessary, the superior's right to have a vassal appears to remain unaffected, and the company would seem to become such by the mere fact of registering their conveyance. The importance of this doctrine will become apparent when we come to consider the case where lands acquired for the purposes of their undertaking are afterwards disposed of by the company. It must also be observed, that the superior has himself an overlord or a series of overlords, for he must hold either mediately

(*a*) Compare secs. 109 and 126.

or immediately of the Crown. So long as the superior's fee is full, the company, having satisfied his claims by redemption or otherwise, have no concern with his overlords; but if by tinsel of his right he should fall out of the feudal chain, the company will have to enter with the next superior, or at least to compensate and redeem his dues and casualties, whatever these may be, as they had done in the case of his vassal.

Crown rights and lands.

It is obvious that, by the removal of the intermediate superior or superiors, the company may ultimately come to stand immediately under the Crown; and the question would then arise, How are the Crown's claims of superiority to be satisfied? The Act is silent on this subject, and regard must therefore be had to the provisions of the common law. Now, by 1455, c. 41 (*a*), the Crown is declared incapable of alienating its real property, except when authorized so to do by Act of Parliament; and the Lands Clauses Act cannot, it is thought, be read as conferring this power. In such a case, therefore, it would seem that the Crown duties and casualties, whatever they may be, cannot be redeemed; but the company must take out an entry like any other vassal, making annual payment of the blanch or feu duties, and arranging for the casualties by payments at fixed terms or otherwise, as in the case of ordinary corporations. It may be objected to this view, that if correct it would be impossible to carry out the purposes of the undertaking, where any part of the lands required to be taken were Crown lands; but the answer to this appears to be, that in such a case the necessary powers would have to be obtained in the special act, or in some auxiliary piece of legislation (*b*).

Exception introduced by 27 and 28 Vict. c. 121.

The only exception to this appears to be that introduced by the Railway Construction Facilities Act, which by sec. 4 enables Crown lands to be sold for the purposes of railways formed under its provisions by agreement with the Commissioners of Woods and Forests, with consent of the Commissioners of the Treasury. The holding would seem in such a case to be blanch or feu, as may be arranged, and the title would have to be completed in the ordinary way.

(*a*) See 1457, c. 71; 25 Geo. II. c. 41; 3 Will. IV. c. 13; 1 Will. IV. c. 25; 2 and 3 Will. IV. c. 112.

(*b*) See Standing Orders, No. 26.

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The company are, as we have seen, entitled to dispose of lands acquired for extraordinary purposes (sec. 13), and are bound to do so in the case of superfluous lands (sec. 120). They are also under the same obligation with respect to the whole lands acquired, when they have abandoned the undertaking, in terms of the Railway Abandonment Act. The question, therefore, presents itself, How are such lands, when disposed of, to be held in future by the purchasers? The only statutory provisions on this subject are the following: secs. 13, 125, 126, and sec. 27 of the Railway Abandonment Act; and it must be admitted that they do not throw much light on the subject. If, however, the views already submitted are accurate, any questions arising in relation to this matter admit of an easy solution. When the company have taken out a regular entry, the purchaser may either become their vassal by subinfeudation, or may obtain a disposition with procuratory and warrant of registration, and so complete his entry with their superior: and the same would hold good even where, the duties and casualties having been redeemed, the company had completed their right by mere registration, without taking out a formal entry; for in such cases, as we have already seen, though the duties and casualties are extinguished, the superiority still remains unaffected. If the immediate superior, being thus deprived of everything but the naked theoretical right of superiority, declines to give an entry, this will be obtained from the next overlord, and so on, to the Crown, which never refuses an entry. Of course, when the lands are sold, in consequence of the dissolution of the company under the Railway Abandonment Act, permanent subinfeudation becomes impossible, and the conveyance ought to provide for the purchaser holding directly under the company's superior.

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Such appears to be the meaning of the statutory provisions when interpreted according to the common principles of the law of Scotland; but it must be admitted that the whole subject, in consequence of the extreme scantiness and ambiguity of the statutory provisions, is involved in very considerable obscurity; and it is by no means clear that the Legislature did not intend to enable companies, where the feudal duties and casualties were bought up, to obtain an estate in land of the nature of the English freehold of inheritance, in which all the feudal incidents should be for ever extinguished.

LAND TAX, POOR-RATES, AND PRISON ASSESSMENT.

How provided for.

If the company acquire any lands charged with such taxes or assessments, they remain, until the works are completed and regularly assessed, liable to make good the deficiency in such assessments caused by the operations. This deficiency is computed according to the value of the rental at which the lands and buildings were rated at the time of passing the special act. The land tax may be redeemed (sec. 127). A water company is liable to be assessed for the poor-rates as owner of the land occupied by the water pipes (*a*); and in the case of railway companies, stations are considered as part of the railway, and are not rated specially in the parish where they may happen to be (*b*).

(*a*) *Edinr. Water Co.* v. *Hay*, 1853, 1 Macq. 682, affirming 12 D. 1240.

(*b*) *Adamson* v. *Edinr. and Glas. Ra. Co.*, 1855, 2 Macq. 331, affirming 15 D. 537.

CHAPTER XIII.

RAILWAY CLAUSES CONSOLIDATION ACT.

Purposes and application of the Act.

THE provisions of this Act, in so far as they relate to aggressive powers to take land, etc., must be regarded as auxiliary to those of the Lands Clauses Act, which we have just been considering. Hence it is declared that railway companies shall be deemed to be under the provisions of the latter Act, and that, except where otherwise provided by the Railway Clauses Act or the special act, the amount of compensation for the lands taken shall be ascertained in accordance with the provision of that Act.

Power to rectify errors in schedule.

The Railway Clauses Act contains an important provision for the rectification of any errors which may have been innocently made in the description of the lands, and of their owners or occupiers, as specified in the plans, books of reference, or schedule referred to in the special act, and allows this to be done by the Sheriff, who is empowered to issue a certificate containing the rectification. Before making the application, ten days' notice must be given to all concerned; and the certificate must be duly lodged with and kept by the officials to be immediately mentioned (sec. 7).

With whom certificate must be lodged.

Before commencing operations, the company must also lodge with the principal sheriff-clerk of any county through which the line is to pass, a plan and section of such alterations on the same scale as the original plan and sections, and with the schoolmaster of the several parishes, and with the town-clerk in all royal burghs within which the alterations have been authorized to be made, copies or extracts of such plans and sections for the inspection of all concerned (secs. 8, 9). Certified copies may be obtained at any time, and they are declared to be legal evidence (sec. 10).

Deviations.

In making the railway, the company cannot deviate from the

General powers.

The company are empowered, within the lands described in their plans, as they see proper, to make, for temporary or accommodation purposes (*a*), bridges, tunnels (*b*), roads, drains, fences, etc.; to alter the course of rivers which are not navigable, or raise or sink their levels as the works may require; to make drains in lands adjoining the line, so as to convey water to or from the railway (*c*); to erect all sorts of edifices, wharfs, and machinery, and to make such alterations on the works as may be required; provided always, that in the exercise of such powers they cause as little inconvenience and damage as possible to those interested (*d*), and make full compensation, as provided for in their special act, or in the Lands Clauses Act (sec. 16).

Impeding navigation.

Special provisions are made against the erection of any works

M'N. and Gor. 112. See, as to this subject of deviation generally, *Little* v. *Newport and Hereford Ra. Co.*, 12 C. B. 752; *Hopkins* v. *Great North. Ra. Co.*, 11 L. T. 306, Cox Cons. Acts, 364; *Taylor* v. *Clemson*, 3 Ra. Ca. 65; *Payne* v. *Bristol and Exeter Ra. Co.*, 2 Ra. Ca. 75. It may be noticed, that the level of a railway, and the legal deviations from such level, are to be taken from the datum line, and not from the surface level, as shown on the deposited plans; and such plans can only be referred to when incorporated with the Act.—*North Brit. Ra. Co.* v. *Tod*, 1846, 5 Bell's App. 185, 12 Cl. and Fin. 722, as reversing 8 D. 726. See also Hodges, p. 355 *et seq.*

(*a*) See, as to these, *postea*, p. 494.

(*b*) In the case of permanent tunnels, the lands must be purchased.—*Ramsden* v. *Manch. Ra. Co.*, 1 Exch. 723. See the case of arches, *Pinchin* v. *Lond. and Black. Ra. Co.*, 1 Kay and J. 34.

(*c*) *Abraham* v. *Great North. Ra. Co.*, 16 Q. B. 586.

(*d*) See Hodges, p. 370. Under this section it has been decided, that when a piece of ground lying between the railway and the lands of an adjacent proprietor was within the limits of deviation, and was scheduled in the special act, the company were entitled to take it against the will of the proprietor, to form a depot, and to make a communication with the lands beyond, though their act did not authorize the formation of a branch line at that point, but at another where it would have been more circuitous and costly.—*Boswell* v. *Glasgow and South-Western Ra. Co.*, 1851, 13 D. 1157. See *Glas. and Green. Ra. Co.* v. *Glas. and Aird. Ra. Co.*, 1849, 11 D. 1212; *Barr* v. *Stirling and Dunf. Ra. Co.*, 1855, 17 D. 582. See *Sadd* v. *Maldon and Braintree Ra. Co.*, 6 Exch. 143; *Cooper* v. *N. B. Ra. Co.*, 1863, 1 Macph. 499.

As to cases in which lands beyond the limits of deviation may be taken for the purposes of a station, see *Crawford* v. *Chester and Holyhead Ra. Co.*, 11 En. Jur. 917; *Cother* v. *Midland Ra. Co.*, 5 Ra. Ca. 187. And as to power to take lands for buildings, although the deposited plans showed that they were required for other purposes, see *Richards* v. *Scarborough Public Market Co.*, 23 Law Jour. (Ch.) 110; *Warden of Dover* v. *South-East. Ra. Co.*, 21 Law Jour. (Chan.) 886; *Gordon* v. *Cheltenham and Great West. Ra. Co.*, 2 Ra. Ca. 800.

See, as to powers to arch over streets for the purpose of building stations, etc., *Attorney-Gen.* v. *East. Counties*

calculated to impede navigation, without having first obtained the consent of the Commissioners of Woods and Forests, and of the Lord High Admiral (sec. 17) (*a*).

Alteration of gas and water pipes.

The position of water-courses and water and gas pipes may be altered for the purpose of constructing the railway, provided this be done at the least possible inconvenience, and at the sight of those in charge of such works (secs. 18, 19); that full compensation for damage be made; and that such alterations do not contravene the provisions of any Act of Parliament relating to such works (secs. 20, 21, 22). If, however, in carrying out such operations, the supply of water or gas is interrupted, the company incur a penalty of £20 for every day the obstruction continues (sec. 23). On the other hand, persons wilfully obstructing the company in the execution of their works are liable in certain statutory penalties (sec. 24) (*b*).

TEMPORARY OCCUPATION OF LANDS.

Roads, grounds, etc., used for temporary purposes.

The company are empowered, at any time before expiration of the prescribed time for the completion of their line, to enter upon and use existing private roads, provided they are not avenues or approaches to mansion-houses, and are not more than five hundred yards from the centre of their line. They must have given three weeks' intimation of their intention to the owners or occupiers of the ground, and must pay such compensation as may be agreed on, or be ascertained in terms of the Lands Clauses Act (sec. 25). They are also entitled to enter on lands not distant more than two hundred yards from the centre of the line, not being private enclosures or ornamental grounds, and not being nearer the mansion-house of the owner than five hundred yards, and to occupy such lands as long as may be necessary for the construction or

Ra. Co., 2 Ra. Ca. 823, and 10 M. and W. 263.

As to power to make temporary bridges, see *Lond. and Birmingham Ra. Co.* v. *Grand Junct. Canal Co.*, 1 Ra. Ca. 224; *R.* v. *Lond. and Birmingham Ra. Co.*, 1 Ra. Ca. 317; *R.* v. *Birmingham and Glouc. Ra. Co.*, 2 Ra. Ca. 694.

(*a*) See, as to this clause, *Abraham* v. *Great North. Ra. Co.*, 16 Q. B. 586; *Manser* v. *Northern and Eastern Counties Ra. Cos.*, 2 Ra. Ca. 380; *Hole* v. *Sittingbourne and Sheerness Ra. Co.*, 30 Law Jour. (Exch.) 81. See Hodges, pp. 390, 395.

(*b*) Contractors for the company entering on lands necessary for the statutory operations are not in the position of trespassers. — *Ewing* v. *York*, 1857, 20 D. 351.

repair of the railway or the accommodation works, and to use them for the purpose of depositing spoil, taking earth and other materials, forming roads thereon for the purposes of the railway, or manufacturing such materials as they may require. They cannot, however, avail themselves of quarries, brick fields, or the like, which are being worked at the date of their special act; and they are liable to action for nuisance, if that arise from their operations (sec. 27) (*a*).

Notice.

Before entering on such lands for the purpose of removing materials, they must give three weeks' notice to the owners and occupiers, and ten days' notice if required for other purposes. These notices must be served as required by sec. 29 (*b*).

Owner may object.

When the owners or occupiers have any objection to state against the company entering on their grounds, either for the purpose of using roads, taking away materials, or doing any of the things before enumerated, they may, within ten days after receipt of the notice, state their objections to the company in writing, and suggest their making use of some other roads, or entering on some other lands; and if the company do not agree to the suggestion, application may be made to the Sheriff, who shall call parties before him, and summarily determine what roads shall be used, and what lands shall be taken (secs. 26, 30, 31).

Finding security.

Before entering on any such lands for the purpose of taking materials from them, the company must, if required, find, seven days before expiration of the notice, two sufficient sureties to enter into a bond for the due payment of such compensation as may become due, in consequence of the contemplated operations. In case of difference, these sureties must be approved of by the Sheriff (sec. 32). The company must also put up such fences and gates as shall be deemed necessary by two justices, if the matter be not settled by agreement (sec. 33). The land must also be worked as the owner by his surveyor or agent may direct, and in case of disagreement, as may be settled by any justice on the application of either party (sec. 34).

Option of compelling purchase.

When the lands required to be entered upon for such temporary purposes as those here contemplated, may be sold under the

(*a*) These powers are rigidly construed.—*Webb* v. *Manch. Ra. Co.*, 1 Ra. Ca. 599.

(*b*) The notice should state the purpose.—*Poynder* v. *Great Nor. Ra. Co.*, 5 Ra. Ca. 201.

provisions of the Lands Clauses Consolidation Act, the owners or occupiers may require the company to purchase, provided this option be exercised before compensation for temporary use has been accepted. The procedure is by notice as in the ordinary case (sec. 35).

Rent, compensation, and mode of ascertaining.

If the company are not required to purchase, they must, if required, within one month after entry on the lands, pay the occupier the value of the crop, and compensation for temporary damage, and must during their occupancy pay half-yearly to the owner or occupier such rent as may be agreed on or be fixed by the Sheriff. They must also, within six months after ceasing occupancy, and not later than six months after the time specified for completing the line, pay or deposit, as the case may require, compensation for the permanent damage caused by their occupancy, including the value of the materials taken (sec. 36). The amount and application of the purchase-money or compensation is determined according to the provisions of the Lands Clauses Consolidation Act (sec. 37) (*a*).

Lands for additional stations, etc.

In addition to the lands taken under compulsatory powers, the company are empowered to contract, with any party willing to sell, for the purchase of land adjoining the line not exceeding the prescribed amount of acres, for the purpose of erecting stations and other buildings, and forming roads, etc., found to be convenient for their traffic (sec. 38).

CROSSING OF ROADS AND CONSTRUCTION OF BRIDGES.

Crossing of roads.

If the line crosses a public highway, it must, unless otherwise provided by the special act, be carried over or under the road; and regulations are made with reference to the construction of the requisite bridges, which must always be maintained by the company (secs. 39, 42, 43, 44). If the line is by the special act allowed to cross on a level, the statute provides certain regulations for ensuring the safety of the public; and the carrying out of these it enforces by penalties (secs. 40, 41) (*b*).

(*a*) See *Donald* v. *Humphrey*, 1839, 1 D. 1184, for the interpretation to be given to special acts, in relation to the temporary occupation of lands, both as regards the owners and the public.

(*b*) By 5 and 6 Vict. c. 55, s. 9, it is provided, that when a railway crosses a road used for carriages, the company must make and maintain gates to fence in the railway, and

Injuring roads.

If the engineering works necessary to enable the railway to cross such roads be such as to render the roads impassable for the time being, the company, before commencing their operations, must provide suitable substitutes for such roads under heavy penalties (secs. 46, 47), without prejudice to the right of the parties suffering injury to recover damages in any competent court (sec. 48). If the road interfered with can be restored compatibly with the purposes of the railway, this must be done; and otherwise, a new or the substituted road must be put into a state of permanent efficiency. These operations must be completed within six months in the case of a turnpike road, and within twelve in the case of any other road (sec. 49). These provisions are guarded by appropriate penalties (sec. 50) (*a*).

must provide proper persons to open and shut such gates. The Board of Trade may, if they see fit, direct such gates to be kept closed across the railway instead of across the road. See *Fawcett* v. *York and North Mid. Ra. Co.*, 16 Q. B. 610.

With reference to construction of bridges, see the following authorities. As to ascent to a bridge, *Attorney-General* v. *London and Southampton Ra. Co.*, 1 Ra. Ca. 283. As to lowering of street so as to obtain the required height under a bridge, *R.* v. *Eastern Counties Ra. Co.*, 3 Ra. Ca. 22. As to the width of approaches to a bridge erected across a railway, *R.* v. *Birmingham and Gloucester Ra. Co.*, 2 Ra. Ca. 694. As to width of bridge itself, *R.* v. *London and Birmingham Ra. Co.*, 1 Ra. Ca. 317. As to width of road under a railway bridge, *Attorney-Gen.* v. *London and Southampton Ra. Co.*, 1 Ra. Ca. 302; *Clarke* v. *Manchester, Sheffield, and Lincoln. Ra. Co.*, 1 Johns. and Hemm. 631; *R.* v. *Birmingham and Glouc. Ra. Co.*, 2 Q. B. 47; *R.* v. *Manchester and Leeds Ra. Co.*, 3 Ra. Ca. 633. The width of the arch of a bridge over roads must be determined with reference to the width of the carriage-road excluding footpaths.—*R.* v. *Rigby*, 14 Q. B. 687. As to the right to erect a bridge at a different angle from the former road, and as to skew arches, *R.* v. *Sharpe*, 3 Ra. Ca. 33. When a company are required to strengthen an old bridge, they may pull it down and build a new one.—*Wood* v. *North Stafford. Ra. Co.*, 1 Macn. and G. 278.

(*a*) The following cases may be noted upon these sections. See *Attorney-General* v. *Great North. Ra. Co.*, 4 De G. and S. 75, as to what is a proper substitute road; *Attorney-General* v. *London and S.-W. Ra. Co.*, 3 De G. and S. 439. If the surveyors or road trustees object to the substituted road, they cannot obstruct it, but must take the proper legal remedies.—*London and Brighton Ra. Co.* v. *Blake*, 2 Ra. Ca. 322. When the deposited plans showed that the railway was to cross a turnpike road at a level, it was held that this was merely permissive, and that the company might elect to carry the road under the railway.—*Braynton* v. *London and N.-W. Ra. Co.*, 4 Ra. Ca. 553. Where a company, in the exercise of their statutory powers, raised the level of a street, and so closed up one entrance to another street which joined the former at right angles, it was held that, as no part of the latter street had been touched

Damage done to roads by the company in the formation of their line, must be repaired and made good as required by the Sheriff or two justices (sec. 51) (*a*).

Crossing at levels.

If the line cross on the level any road other than a public carriage-way, the company must at all times provide proper gates or stiles, convenient approaches, handrails, and fences, as the case may require (sec. 52); and for this purpose they must, fourteen days before commencing operations, give intimation of their intention by advertisement and otherwise, as required by the Act, and must be guided in their proceedings by the direction of the Sheriff or two justices (secs. 53, 54).

Powers of trustees and surveyor.

Where the trustees of a turnpike road or the surveyor of a highway apprehend danger to the public, from trains passing on the railway, they may apply to the Board of Trade, after giving fourteen days' notice to the company; and the Board may certify such works as they may deem necessary to be executed, which must accordingly be completed by the company within the period appointed in the certificate, under certain penalties (secs. 55, 56) (*b*).

or interfered with, the company were not bound to provide a substitute road.—*Law and Co.* v. *Caled. Ra. Co.*, 1851, 13 D. 1122. Where it would have been necessary, according to the deposited plan of a railway, in order to carry a road under the line, to alter it considerably as regarded its levels, it was held that the road was not in the position of a road that could 'be restored compatibly with the formation and use of the railway,' and therefore that the company were entitled to divert it.—*Christie* v. *Caled. Ra. Co.*, 1847, 10 D. 312.

As to scheduling of roads, see *Campbell* v. *Edinburgh and Glasgow Ra. Co.*, 1855, 17 D. 613, and 17 D. 790.

If the road is carried over the railway, the company are bound in the perpetual maintenance not only of the bridge and approaches, but of the roadway over them.—*North Stafford. Ra. Co.* v. *Dale*, 8 E. and B. 836; *Leach* v. *North Stafford. Ra. Co.*, 29 Law Jour. (M. C.) 151. If the road is carried under the railway, they are not bound to keep it in repair.—*London and N.-W. Ra. Co.* v. *Skerton*, 33 Law Jour. (M. C.) 158. See also *Waterford and Limerick Ra. Co.* v. *Kearney*, 12 Irish C. L. Re. 224.

(*a*) A piece of land having been taken by a railway company for a depot, of which the proprietor was aware, a jury awarded £42, 2s. 5d. as compensation. It was afterwards held, in a question as to the rights of the company to make use of certain roads as means of access to the ground, that as the purpose was known to the proprietor and the jury to be one which necessarily required access, a right of access by these roads must have been included by the jury among the subjects for which they awarded compensation.—*Scott* v. *Edin., Leith, and Granton Ra. Co.*, 1848, 11 D. 91.

(*b*) A turnpike road means one on which toll-gates are erected and tolls taken thereat.—*Northam. Bridge and*

Damages and penalties.

Failure or neglect on the part of the company to keep bridges, fences, approaches, gates, etc., in proper repair, may be made the subject of complaint to the Sheriff or two justices, by the road surveyor or two householders, after ten days' notice to the company. Appropriate penalties are provided (sec. 57) (*a*).

When a rigid compliance with provisions of the special act is impossible.

It may sometimes happen that a rigid compliance with the provisions of this or the special act in the construction of engineering works would be practically impossible, or attended with inconvenience without adequate advantage. In such cases, it is competent for the company on the one hand, and the trustees' commissioners or others charged with the duty of attending to the public interest on the other, to apply to the Board of Trade for directions; and that body are empowered to decide upon what alteration shall be allowed, and to issue a certificate accordingly (sec. 58).

ACCOMMODATION WORKS.

Accommodation works.

The company are required to provide and maintain certain works for the accommodation of lands adjoining the railway, which have been taken or severed from other lands for the purpose of constructing the line. The object of these works is to afford safe access to the lands (*b*), to protect them from trespass, to prevent straying of cattle, to convey away water, and to provide suitable watering-places for cattle where those formerly used have been destroyed or rendered unavailable.

Roads Co. v. *London and Southamp. Ra. Co.*, 1 Ra. Ca. 653.

(*a*) When a company destroyed a ford and substituted a bridge, they were held liable to keep the bridge in repair.—*R.* v. *Inhabitants of Kent*, 13 East 220; *R.* v. *Inhabitants of Lindsey*, 14 East 317. When a bridge was erected by a company over a navigable river, it was held that the company and not the county were liable in its repair and maintenance.—*R.* v. *Kerrison*, 3 M. and S. 520; *R.* v. *Inhabitants of Ely*, 15 Q. B. 827. See, as to keeping drains, sewers, etc., in repair, *Priestly* v. *Foulds*, 2 M. and G. 175; *R.* v. *Bristol Dock Co.*, 2 Ra. Ca. 599.

(*b*) Discontiguous parts of an estate were connected by a statute labour road, which formed the usual access from the turnpike to the mansion-house. A railway passed through one part of the estate, and crossed the statute labour road at a point to which no part of the estate was immediately adjacent. In a reduction of a verdict of a jury finding the proprietor entitled to damages for the level crossing, and assessing the amount, it was held that the proprietor was not entitled to damages on account of the level crossing.—*Caled. Ra. Co.* v. *Ogilvy*, 1855, 18 D. (H. of L.) 20, 2 Macq. 229, reversing 15 D. 410.

Compensation may be made in lieu of accommodation works.

The company are not, however, required to make such accommodation works in a way that would prevent or obstruct the working of their line; and they have the alternative of making compensation to the owner and occupiers of the lands for the want of accommodation works, as the same may be settled by agreement, and otherwise as in cases of disputed compensation (sec. 60).

Modes in which the accommodation works necessary are determined.

If the company do not avail themselves of this option, they must make such accommodation works as may be agreed on; and if the matter cannot be arranged, it must be determined by the Sheriff or two justices, who also fix the time within which such works shall be commenced and executed by the company (sec. 61) (*a*). If for seven days the company fail to begin operations, and to proceed in conformity with such decerniture, the works may be executed by the party aggrieved (sec. 62). The expense must in that case be repaid by the company; and in case of dispute, its amount is determined by the Sheriff or two justices (sec. 62) (*b*).

Power of owners to make additional accommodation works.

If the owners or occupiers consider that the accommodation works directed to be made are insufficient, they may, with the company's consent, or with the authority of the Sheriff or two justices, make additional works; but this must be done at their

(*a*) In a case where it was alleged that the necessary accommodation works had not been agreed on or constructed, interdict was refused against the railway company proceeding with the construction of the railway, as the proper remedy was that provided in secs. 60, 61, and 62.—*Black, etc.*, v. *Formartine and Buchan Ra. Co.*, 1861, 23 D. 600. A railway company became bound to provide a proprietor, through whose lands their line passed, with an accommodation archway of a particular description. The arch was built, but it was afterwards destroyed by a flood, and was reconstructed by the company in a different manner. Upon this the proprietor raised an action, concluding that they should be ordained to restore the arch in the same way as originally constructed. It was pleaded by the company that the arch could not with safety be reconstructed on the original plan; that they possessed power under their special act to alter works and to substitute others in their place when necessary; and that as they had given the proprietor as good an access as formerly, he could not claim specific performance. The Court remitted the case for trial under the issue, whether the defenders had wrongfully failed to reconstruct the archway.—*Hay* v. *North British Ra. Co.*, 1850, 12 D. 1230. See *Storer* v. *Great Western Ra. Co.*, 3 Ra. Ca. 106; *London and Birmingham Railway Company* v. *Grand Junction Canal Company*, 1 Ra. Ca. 224.

(*b*) These expenses cannot form the subject of compensation to be assessed by a jury.—*R.* v. *South Wales Ra. Co.*, 13 Q. B. 988.

own expense, and if required by the company, at the sight of their engineer. The company, however, cannot require that plans should be adopted which would involve a greater expense than that incurred in the execution of similar works by the company (secs. 63, 64).

Termination of company's liability to make accommodation works.

The company cannot be required to make any further or additional accommodation works after expiration of the prescribed period, and if none be prescribed, after five years from the opening of the line for traffic (sec. 65) (*a*).

Rights of owner till completion of works.

Until the company have completed proper communications between intersected lands, those entitled to access may freely cross and recross the line of railway directly at the required points, but so as not to obstruct or damage the line. This right is, however, taken away, in so far as the owner or occupier is concerned, by his receiving or agreeing to receive compensation for the loss of such communication (sec. 66) (*b*).

(*a*) In relation to accommodation works, the following observations may be found useful. The right to have such works constructed is altogether irrespective of the right to compensation for taking the land. See *South Wales Ra. Co.* v. *Richards*, 13 Q. B. 988; *Skerratt* v. *North Stafford. Ra. Co.*, 5 Ra. Ca. 177. Accommodation works are properly what, at the time of making the line, appear to be necessary for the accommodation of the owners and occupiers of the adjacent lands, as contradistinguished from what may afterwards be rendered necessary by emerging circumstances, such as working of mines and the like.—*R.* v. *Fisher*, 3 Best and S. 191; *Darnley* v. *London, Chatham, and Dover Ra. Co.*, 9 E. Jur. N. S. 148. The obligation to put up fences and gates to prevent straying of cattle, applies only as in a question between the company and the owners or occupiers of the adjacent grounds. Hence, if cattle stray into a field adjoining the railway, or get there without the consent of the owner or occupier of the field, and afterwards enter on the railway and are injured, the company are not liable.—*Ricketts* v. *East and West India Docks and Ra. Co.*, 12 C. B. 160; *Manchester, Sheffield, and Lincoln Ra. Co.* v. *Wallis*, 14 C. B. 213; *Midland Ra. Co.* v. *Daykin*, 17 C. B. 126. It does not apply to adjoining lands belonging to the company. Hence the company are not liable for injuries received by cattle grazing by permission on the slopes, etc., of the railway, and straying thence on the line.—*Marfell* v. *South Wales Ra. Co.*, 29 Law Jour. (C. P.) 315; *Hounsell* v. *Smyth*, 29 Law Jour. (C. P.) 203; *Roberts* v. *Great Western Ra. Co.*, 27 Law Jour. (C. P.) 266; *Hardcastle* v. *South Yorkshire Ra. Co.*, 28 Law Jour. (Exch.) 139; *Binks* v. *South Yorkshire and River Dun Co.*, 32 Law Jour. (Q. B.) 26. The elapse of the prescribed period does not preclude a landlord from requiring insufficient works to be made sufficient.—*Brown* v. *Edinr. and Glas. Ra. Co.*, 1864, 1 Macph. 875.

(*b*) See, as to this, *Manning* v. *East. Counties Ra. Co.*, 3 Ra. Ca. 637; *Grand Junct. Ra. Co.* v. *White*, 2 Ra. Ca. 559.

Branch lines.

The Act contains certain provisions for enabling the owner of adjacent lands and others to lay down branch lines for communicating with the railway (sec. 69) (*a*). These provisions are, however, subject to the restrictions of 5 and 6 Vict. c. 55.

MINES LYING UNDER OR NEAR THE RAILWAY.

Rights of owners as to mines.

The company are entitled to use the lands acquired by them under their aggressive powers for such purposes only as are required for constructing and working their line. Unless, therefore, they have expressly purchased them, the company are not entitled to mines or minerals contained in the lands so acquired (sec. 70) (*b*); and the owners are entitled to work them notwithstanding formation of the railway, subject to certain provisions. When the minerals lie right under the railway, or forty yards therefrom, or within such distance as may be prescribed, the owner, before proceeding to work them, must give the company thirty days' written notice. On receiving this notice, they are entitled to inspect the mines proposed to be worked, and may, if they think such working dangerous or inconvenient, give a counter notice that they object to the working, in whole or in part, and are willing to give compensation (sec. 71); but if no notice to this effect is given within the thirty days, the owner may proceed to work as he intended, and he may also do so in respect to such minerals as the notice, if given, does not include. Any breach of the notice, however, on his part will subject him in damages, and will also entitle the company to

(*a*) By an act incorporating a railway company for mineral traffic, power was given to adjoining proprietors to cross the line with railways. Subsequently the company, by an agreement with another company, made it a line for passengers. It was held that a proprietor could cross the line with his railway in such a manner only as was consistent with public safety; that he was not entitled to cross on a level; that his railway must be carried either above or under the line; but that the additional expense caused by this mode of crossing must be borne by the company.—*Wishaw and Coltness Ra. Co.* v. *Dixon*, 1849, 11 D. 557.

(*b*) See, as to this clause, *Fletcher* v. *Great West. Ra. Co.*, 28 Law Jour. (Ex.) 147, and 29 Law Jour. (Ex.) 253; *R.* v. *Leeds and Selby Ra. Co.*, 3 A. and E. 683; *Cromford Canal Co.* v. *Cutts*, 5 Ra. Ca. 442. Mines have been held to be quarries or places out of which anything is dug. See *Darvill* v. *Roper*, 3 Dr. 294; *Bowes* v. *Ravensworth*, 15 C. B. 512; *Rosse* v. *Wainman*, 2 Ex. 800; *Micklethwait* v. *Winter*, 6 Ex. 644.

have such obstruction as he may have created removed at his expense (sec. 72).

When working of mines is prevented by the company.

When the working is prevented by the company, the owner may make such airways, gateways, or water-levels through the strata which he is prevented from working as may be requisite for ventilation, drainage, etc., in conformity with the prescribed measurements, but not so as to injure the line or impede the traffic (sec. 73). The company must pay from time to time all such expenses, losses, or damage as arise from the severance of his minerals from his other lands, or from his being obliged to work them under such restrictions as are imposed in the interest of the railway (secs. 74, 75).

Assessment of compensation.

All compensation connected with these matters is assessed as in other cases of disputed compensation (secs. 71, 74).

Power of company to examine the workings.

To enable the company to ascertain whether the minerals are being or have been worked so as to damage the railway, they are empowered, after giving twenty-four hours' written notice, to enter on the lands and inspect the works (sec. 76). Refusal on the part of the owner to permit such inspection subjects him in a penalty of £20 (sec. 77). If it appear that the minerals have been worked contrary to the statutory provisions (*a*), the company may require the

(*a*) A proprietor sold lands for a railway, reserving the minerals, and liberty to work them. It was held that the conveyance of surface implied right to adequate and adjacent support, and that the owner of the minerals was not entitled to work them to the endangering of the railway. *Caled. Ra.* v. *Sprot*, 1856, 19 D. (H. of L.) 3, 2 Macq. 449, 28 Jur. 486, reversing 16 D. 559 and 955; *Caled. Ra. Co.* v. *Belhaven*, 1857, 19 D. (H. of L.) 5, 29 Jur. 380, 3 Macq. 56. See, as illustrative of the right to compensation for mines, *Fletcher* v. *Gt. West. Ra. Co.*, 28 Law Jour. (Ex.) 147, and 29 *ibid.* 253; *Barnsley Canal Co.* v. *Twibell*, 13 Law Jour. (Ch.) 434; *Cromford Canal Co.* v. *Cutts*, 5 Ra. Ca. 442. As to future damages to be caused to mines after the lands had been valued and sold, it has been held that where the damage might have been foreseen, and yet no claim was made for compensation at the time of the sale, none could afterwards be claimed. *R.* v. *Leeds and Selby Ra. Co.*, 3 A. and E. 683; *R.* v. *Aire and Calder Navig.*, 30 Law Jour. (Q. B.) 337. In these cases, however, the loss for which compensation was claimed arose from the seller pushing his workings to the land on which the railway was made. Hence, where the future injury for which compensation was claimed arose from the direct act of the company, mandamus was issued to compel assessment of compensation. —*R.* v. *North Midland Ra. Co.*, 2 Ra. Ca. 1. See *Lister* v. *Lobley*, 7 A. and E. 124, Hodges 233. Where a company are by their act entitled to acquire coal mines, and in that case to forbid their being wrought, it seems that if they

owner to adopt such measures as may be necessary for the safety of the railway, and on his failure they may construct the necessary works at his expense (sec. 78).

do not exercise their right, they cannot claim compensation for injury caused to their undertaking by the coal owner working his mines in the usual way.

See *Dudley Canal Co.* v. *Grazebrook*, 1 B. and Ad. 59; and *Stourbridge Canal Co.* v. *Dudley*, 30 Law Jour. (Q. B.) 108.

CHAPTER XIV.

IN WHAT CASES COMPENSATION MAY BE CLAIMED.

HAVING now examined the provisions of the Consolidation Acts in relation to aggressive powers, and the statutory machinery for obtaining compensation for the consequences of their exercise, it is proposed in the present chapter to point out the legal principles, in conformity with which the right to obtain compensation under these statutes has been interpreted and defined, and to give some illustrations of the kind of damage or injury for which compensation may be claimed.

In what cases compensation contemplated.

From the language of the Consolidation Acts, it is clear that compensation is always due where lands, or any interests therein, are taken or used by the company for the purposes of their undertaking, as defined by their special act. No difficulty, therefore, presents itself, in so far as this is concerned. But as provision is also made for compensation where lands or their accessories, not taken or used, are injuriously affected, questions have arisen as to the kind of injuries which in such circumstances entitle to compensation; and even when compensation is plainly due, it has often been made a question whether it was to be ascertained and recovered under the statutory provisions, or by ordinary action.

General principles and rules.

In dealing with such questions, the following principles have received effect. A company may cause injury not only by doing that which it is lawful for them to do by reason of their aggressive powers, and which but for these powers would be unlawful, but by doing something which, being in excess of their aggressive powers, or not being done in conformity therewith, is unlawful, notwithstanding their being vested with such powers. Now it is held,

that in the former case only is the injured party entitled to have compensation assessed under the statutory provisions; and that in the latter his remedy is at common law, by interdict, action of damages, or otherwise, as the circumstances of the case may require (*a*). Even where the injury arises from what the company are lawfully entitled to do, it does not necessarily follow that they are liable in compensation under the statutes, for the act causing the injury complained of may be one which they would be entitled to do altogether irrespective of their statutory powers; and the injury may be of such a nature, that it is equally shared by the complainer and every other member of the community. In such cases, it is held that if, irrespective of the statute, the act complained of would not have grounded action at common law, the statute does not entitle to compensation unless where it contains a special provision to that effect (*b*). Where, however, the injury is such that the complainer suffers private and particular damage beyond the rest of the Queen's subjects, he will be entitled to compensation (*c*).

Examples of compensation.

Having thus indicated the principles which will be applied in cases of compensation under the statutes, we shall now give lists of the more important cases, arranging them under appropriate headings.

Compensation for injury to access to property by changing level of public road:—*Moore* v. *Great South. and West. Ra. Co.*, 10 Irish C. L. Re. 46; *R.* v. *East. Count. Ra. Co.*, 2 Ra. Ca. 736; *Tushey* v. *Great South. and West. Ra. Co.*, 10 Irish C. L. Re. 98; *Hunter* v. *North British Ra. Co.*, 1849, 12 D. 37; *Caled. Ra. Co.* v. *Ogilvie*, 1853, 15 D. 410; 1855, 18 D. (H. L.) 28, 2 Macq. 299.

(*a*) *Caledonian Ra. Co.* v. *Colt*, 1860, 3 Macq. 833, reversing 21 D. 1108; *Broadbent* v. *Imperial Gas Co.*, 7 H. of L. Ca. 600. See also *per* Lord Denman in *R.* v. *Eastern Counties Ra. Co.*, 2 Q. B. 347; *Chamberlain* v. *West-End and Crystal Palace Ra. Co.*, 32 Law Jour. (Q. B.) 173.

(*b*) *Caled. Ra. Co.* v. *Ogilvy*, 1855, 2 Macq. 229, reversing 15 D. 410; *New River Co.* v. *Johnson*, 29 Law J. (M. C.) 93; *Acton* v. *Blundell*, 12 M. and W. 324; *Wood* v. *Stourbridge Ra. Co.*, 16 C. B. (N. S.) 222; *South Stafford Ra. Co.* v. *Hall*, 6 Ra. Ca. 389; *Gattke's* case, 6 Ra. Ca. 371; *R.* v. *Metropolitan Board of Works*, 32 Law J. (Q. B.) 105.

(*c*) *Chamberlain* v. *West-End and Crystal Palace Ra. Co.*, 32 Law J. (Q. B.) 173.

For crossing private roads:—*Glover* v. *North Stafford Ra. Co.*, 16 Q. B. 912; *South Stafford Ra. Co.* v. *Hall*, 1 Sim. (N. S.) 388; *Campbell* v. *Edin. and Glasgow Ra. Co.*, 1855, 17 D. 790.

For impeding access to a ferry:—*Re Cooling*, 19 Law Jour. (Q. B.) 25, 14 Q. B. 25; *Macey* v. *Metropolitan Board of Works*, 33 Law Jour. (Ch.) 377.

For impeding a canal towing-path:—*R.* v. *Thames and Isis Nav. Comm.*, 5 A. and E. 804.

For flooding of lands:—*Ware* v. *Regent's Canal Co.*, 23 Beav. 575.

For injury to a house from tunnel being made under or near it:—*Lond. and North-West. Ra. Co.* v. *Bradley*, 6 Q. B. 759; *Bradley* v. *South. Local Board of Health*, 4 E. and B. 1014; *Croft* v. *Lond. and North-West. Ra. Co.*, 32 Law Jour. (Q. B.) 113; *Sparrow* v. *Oxford and Wolver. Ra. Co.*, 2 De G. M. and G. 94; *Ramsden* v. *Manch. Ra. Co.*, 1 Exch. 723; *Piper* v. *Hammersmith and City Ra. Co.*, Q. B. M. T. 1864.

For injury to mines:—*Cromford Canal Co.* v. *Cutts*, 5 Ra. Ca. 442; *Barnsley Canal Co.* v. *Twibell*, 13 Law Jour. (Ch.) 434; *Fletcher* v. *Great West. Ra. Co.*, 29 Law Jour. 253; *R.* v. *Leeds and Selby Ra. Co.*, 3 A. and E. 683; *R.* v. *Aire and Calder Navig.*, 30 Law Jour. (Q. B.) 337; *R.* v. *North Mid. Ra. Co.*, 2 Ra. Ca. 1; *Glasgow and Neilston Ra. Co.* v. *Nitshill Coal Co.*, 1850, 7 Bell's App. 325, reversing 11 D. 327.

For injury to tenants:—*Falconer* v. *Aberdeen Ra. Co.*, 1853, 15 D. 352; *Caled. Ra. Co.* v. *Burr*, 1855, 17 D. 312; *Peddie* v. *Brown and Co.*, 1857, 20 D. (H. L.) 1, 3 Macq. 65; *Hunter* v. *North Brit. Ra. Co.*, 1849, 12 D. 37; *Glas. and Neilston Ra. Co.* v. *Nitshill Coal Co.*, 1850, 7 Bell's App. 325; *North Brit. Ra. Co.* v. *Hay*, 1852, 14 D. 832; *Inge* v. *Birm., Wolver., and Stour Valley Ra. Co.*, 3 De G. M. and G. 658. The following English cases occurred under special acts, with provisions similar to those of the Consolidation Acts. Lessees for years:—*Re Palmer and Hungerford Market Co.*, 9 A. and E. 463; *R.* v. *Liverpool and Manch. Ra. Co.*, 4 A. and E. 650; *Jubb* v. *Hull Dock Co.*, 9 Q. B. 443. Tenants from year to year:—*R.* v. *Southampton Ra. Co.*, 1 Ra. Ca. 717; *ex parte Farlow*, 2 B. and Ad. 341; *ex parte Nadin*, 17 Law Jour. (Ch.) 421; *Wainwright* v. *Ramsden*, 1 Ra. Ca. 714.

CHAPTER XV.

BYE-LAWS.

General observations.

THE power to make bye-laws binding on their own members or servants is possessed at common law by every corporation; and the only limit to the exercise of this power is, that such bye-laws shall not be contrary to the provisions of the incorporating instrument, or to the laws of the land (*a*). But beyond this, powers to make bye-laws which shall be binding on the public generally are frequently conferred on companies incorporated for the carrying on of public undertakings. Such powers are plainly infringements on the rights of the public as defined by the constitutional law, and therefore, like other extraordinary powers, they cannot, in modern times at least, be conferred otherwise than by the action of the Legislature.

Bye-laws binding on the public;

statutory provisions regarding.

Such powers, however, being often necessary for the prosecution and management of undertakings of a public nature, are, when required, conferred on the company by their special act. But as their exercise, if uncontrolled, might be highly detrimental to the interests of the public, various important provisions have been made in the General and Consolidation Acts, calculated to ensure that no bye-laws shall be framed of an objectionable, unnecessary, or oppressive character. By the 3 and 4 Vict. c. 97, it is provided that copies of all bye-laws, etc., made before the date of the Act (10th August 1840) should, within the two following months, be laid before the Board of Trade (sec. 7); and that no bye-laws, etc., made subsequently to the date of that Act, and no rules or regulations annulling existing bye-laws, etc., shall have any force or effect

(*a*) *Graham* v. *Writers to the Signet*, 1 W. and S. 538 (1825), reversing 2 S. 214. See also *Galloway* v. *Ranken*, 1864, 2 Macph. 1199.

until the elapse of two months after a copy of them, duly certified, shall have been laid before the Board of Trade, unless the Board shall before such time have signified their approval thereof (sec. 8). Similar provisions are also made by the Railway Clauses Act, 1863, as to bye-laws relating to passengers, cattle, and goods conveyed in steam-vessels belonging to railway companies (sec. 32).

26 and 27 Vict c. 93, s. 32.

If the Board of Trade are dissatisfied with any such bye-laws, whether before or after they have come into operation, they may notify to the company their disapproval of them, and in certain cases the time at which they shall cease to be in force (sec. 9). Bye-laws so disallowed cease to have any force, notwithstanding they may have received the approval of sheriffs, justices, quarter sessions, or other officials empowered by former Acts to give them validity (sec. 10). These provisions do not, however, apply to bye-laws framed for the regulation of the servants of the company.

3 and 4 Vict. c. 97

By the Companies Clauses Consolidation Act, companies formed under its provisions are empowered to make bye-laws for regulating the conduct of their officers and servants, and for providing for the due management of the affairs of the company in all respects whatever, and from time to time to alter and repeal the same, provided that such bye-laws are not repugnant to the common law, or to the provisions of the special or general Acts (sec. 127). Power is also given to impose penalties for their infringement on the company officials, but not on the public (secs. 128, 129). Such bye-laws must be authenticated by the seal of the company, and a copy of them given to every company official affected thereby (sec. 127); and a copy of them, authenticated as above, is declared to be sufficient evidence of their authenticity (sec. 130). Such bye-laws are not stated to require the sanction of the Board of Trade; and the reason of this appears to be, that they are intended to apply to the company's servants, and not to the public generally.

8 Vict. c. 17.

By the Railway Clauses Consolidation Act, a railway company is empowered to make bye-laws from time to time for the regulation of their traffic and the prevention of nuisances, provided such bye-laws obtain the sanction of the Board of Trade as already explained, and be not repugnant to the common law or the statutory provisions. They must be reduced to writing, and be authenticated by

8 and 9 Vict. c. 33.

the common seal of the company. Certain penalties may be enforced against all persons whomsoever contravening their provisions; and where their infraction is attended with danger or annoyance to the public, or hindrance to the company, the company may summarily interfere, without prejudice to any penalty incurred by such infraction (secs. 101, 102, 103). The substance of such bye-laws must be printed, and kept affixed on the front or other conspicuous part of any wharf or station belonging to the company; and when so confirmed, published, and affixed, they become binding on the public, and may be acted on by the company (secs. 103, 104).

26 and 27 Vict. c. 92.

The Railway Clauses Act, 1863, contains similar provisions, empowering railway companies to make bye-laws to regulate the traffic of steam-vessels employed by them in connection with their line (sec. 32).

The mere sanction of the Board of Trade does not render bye-laws effective if otherwise illegal.

It must be observed, that though bye-laws requiring to be sanctioned, and not sanctioned, by the Board of Trade, are of no effect, it does not follow, that because they have obtained that sanction, they are necessarily legal and capable of enforcement (*a*). As a general rule, it may be laid down, that all bye-laws in restraint of trade, unless they be reasonable and beneficial to the public, are illegal. Thus it has been held in England, that bye-laws closing a public navigation throughout every Sunday of the year are invalid (*b*); and bye-laws exempting the company from their statutory or other common law liabilities to the public, as *e.g.* for goods and luggage, are nullities (*c*). Bye-laws imposing penalties on passengers not paying their fares, or exhibiting their tickets as required by the company, have been held invalid, when such bye-laws exceeded the powers conferred on the company by their special acts (*d*). When, however, the bye-law is obviously for the benefit or safety of the public, it may be less rigorously construed (*e*).

(*a*) *R.* v. *Wood*, 5 E. and B. 49.

(*b*) *Calder and Hebble Naviga. Co.* v. *Pilling*, 14 M. and W. 76; *Elwood* v. *Bullock*, 6 Q. B. 383.

(*c*) *Great West. Ra. Co.* v. *Goodman*, 12 C. B. 313; *Williams* v. *Great West. Ra. Co.*, 10 Exch. 15.

(*d*) *R.* v. *Frere*, 4 E. and B. 598; *Chilton* v. *London and Croydon Ra. Co.*, 5 Ra. Ca. 4.

(*e*) *Motteram* v. *East. Counties Railway Company*, 29 Law Jour. (M. C.) 57, 7 C. B. N. S. 58.

CHAPTER XVI.

GENERAL PROVISIONS AS TO RAILWAY TRAFFIC.

Intentions of the Legislature.

It was not the intention of the Legislature to confer on railway companies a monopoly of the traffic passing on their lines (*a*); and accordingly, by the Railway Clauses Consolidation Act, sec. 85, all companies and persons are entitled to use the railway with engines and carriages properly constructed, subject to 5 and 6 Vict. c. 55, and to such regulations as the company are authorized to make. The railway company may, however, themselves provide steam-power and carriages for the conveyance of goods and passengers; and experience has shown that safety cannot be expected unless the traffic on a railway is under the exclusive control of the company (*b*).

Provisions for the safety and convenience of the public.

But it is obvious that whether the company charge tolls on carriages using their lines, or, by furnishing engines and carriages, combine in themselves the double character of owners of the line and carriers of the traffic, they will always, in the absence of a competing line, obtain a practical monopoly. To prevent or diminish the worst consequences of such a monopoly, various enactments have been passed to ensure that mails, troops, passengers, and goods shall be conveyed in a safe and commodious manner, at proper times, and on reasonable charges.

Provisions as to railway gauge and engineering works.

By the 9 and 10 Vict. c. 57, it is enacted that, with certain exceptions, four feet eight inches in Great Britain, and five feet three inches in Ireland, shall be the gauge in future of railways conveying passengers. These provisions are guarded by

(*a*) *R.* v. *Severn and Wye Ra. Co.*, 2 B. and Ald. 648.

(*b*) *R.* v. *Lond. and South-West. Ra. Co.*, 1 Q. B. 558; *R.* v. *Grand Junct. Ra. Co.*, 4 Q. B. 38.

heavy penalties, in addition to which the railway may be abated and removed by the Commissioners of Woods and Forests, or the Board of Trade. By the Railway Clauses Consolidation Act, and by the Railway Clauses Act, 1863, the Board of Trade are empowered to sanction such deviations on the engineering works described in the parliamentary sections as may be required for public safety, and to require certain arrangements to be made for the same purpose. By the 5 and 6 Vict. c. 55, no railway, or any portion thereof, can be opened for passengers until one calendar month after notice of the intention to open has been given to the Board of Trade, and until ten days after a like notice has been given of the time when the line will be, in the opinion of the company, sufficiently completed for the safe conveyance of passengers, and ready for inspection (sec. 4). An inspection is then made by an engineer officer appointed by the Board, not only of the line itself, but of the stations, buildings, engines, and carriages; and every facility for that purpose must be given him by the company, under heavy penalties (*a*). If, from the insufficiency of the works or plant, danger to the public is apprehended, the Board may postpone the opening from time to time, until the grounds of danger have been removed (*b*); and if the company open without giving the required notices, or in contravention of directions to the contrary from the Board, they incur a penalty of £20 for every day the railway continues open (*c*).

Powers of Board of Trade after opening of railway.

After the railway is opened, it still continues subject to the supervision of the Board of Trade. If two or more railways have a common terminus, or a common right to the use of a portion of the same line, and cannot agree upon an arrangement to conduct their traffic with safety to the public, the Board may, on the application of either company, decide the matters in dispute, in so far as the public safety is concerned (*d*). The Board of Trade are likewise empowered to interfere in the case of branch lines (*e*) and level crossings, where the safety of the public is involved (*f*). Where the line crosses a turnpike or public carriage road on a level, the

(*a*) 3 and 4 Vict. c. 97, s. 5; 7 and 8 Vict. c. 85, s. 15.
(*b*) 5 and 6 Vict. c. 55, s. 6.
(*c*) Sec. 5.
(*d*) 5 and 6 Vict. c. 55, s. 11.
(*e*) *Ibid.* sec. 12.
(*f*) *Ibid.* sec. 13.

company must erect a lodge, and keep a proper person to watch at the crossing, and must conform to such regulations as to speed, etc., when their trains pass the level crossing, as may be laid down by the Board of Trade (*a*). When the safety of the public seems to require it, the Board may direct a bridge to be substituted by the company for the level crossing; and in such a case the company are empowered to take additional land for that purpose (*b*). The Board of Trade have also a power to regulate the mode in which gates should be placed and closed at level crossings, and the rate of speed at crossing turnpikes near stations, which must never exceed four miles an hour (*c*). The erection of proper screens, etc., on the side of roads adjoining a railway are likewise placed under their control (*d*).

Board of Trade may sanction entry on lands.

Where the safety of the public requires it, the Board of Trade are empowered to authorize the company to enter on lands adjoining the railway, for the purpose of making works or erecting buildings, even though this exceeds the aggressive powers conferred by the special act. Preventing or repairing accidents, such as landslips, warrant the Board to exercise this power (*e*). And when the company's compulsatory powers have expired, if the Board of Trade issue a certificate to the effect that the public safety requires additional land to be taken for increasing the width of embankments or the inclination of slopes, for making approaches to bridges or archways, or for making any works for the repair or prevention of accidents, the compulsatory powers, to the extent so certified, revive (*f*).

Powers of Board of Trade to check malversation on the part of the company.

If a railway company contravene the provisions of its special act, or any Acts of a general kind applicable to railways, fails to comply with the requirements of such Acts, or acts in a manner unauthorized by their provisions, and it appears to the Board of Trade that the public interests require such proceedings to be checked, the Board are required to certify the same to the Attorney-General for England or Ireland, or to the Lord Advocate for Scotland; and these officials must then take such proceedings as may be necessary to recover the statutory penalties, or otherwise to enforce due performance of the statutory provisions, and to

(*a*) 26 and 27 Vict. c. 92, s. 6.
(*b*) *Ibid.* secs. 7 and 8.
(*c*) 5 and 6 Vict. c. 55, s. 9; 8 and 9 Vict. c. 33, ss. 40 and 41.
(*d*) *Ibid.* sec. 55.
(*e*) 5 and 6 Vict. c. 55, s. 14.
(*f*) *Ibid.* sec. 15.

restrain the company from continuing to act in an illegal manner (*a*). It is provided, however, that the Board shall not issue their certificate until twenty-one days after notice has been given to the company, and that no legal proceedings shall be commenced by the said officials except upon such certificate, and not later than one year after the offence has been committed (*b*).

ıtions of y com- to con- ails.

All railway companies are bound to convey her Majesty's mails, and at their own costs to provide sufficient engines and carriages for this purpose (*c*). They must obey such orders as they receive from the Postmaster-General as to hours of starting, places and times of delivery, stoppages, guards, ordinary or special trains, etc. As to the rate of speed, it is provided that it shall not be required to exceed the maximum prescribed by the directors for the conveyance of first-class passengers, nor twenty-seven miles an hour in certain specified cases (*d*). The rate of remuneration to be paid the company for services of this kind is fixed by agreement between the company and the Postmaster-General; and in case of difference, it is determined by arbitration, as provided by the statute (*e*). But the required services cannot be postponed or suspended until the rate has been arranged (*f*); and the services once required cannot be terminated by the Postmaster-General, without giving the company six months' notice, or an equivalent compensation (*g*).

yance of etc.

Railway companies are bound to carry troops, arms, and warlike stores at the desire of the proper authorities at certain statutory rates (*h*).

ıodes in railways e used.

The Legislature, as has been already seen, contemplates two ways in which railways may be rendered available for the purposes of public traffic. 1*st*, They are required to place the line, like a public highway, at the disposal of all persons or companies desiring to run engines and carriages thereon, provided such engines and

(*a*) 7 and 8 Vict. c. 85, s. 17.

(*b*) *Ibid.* s. 18.

(*c*) 1 and 2 Vict. c. 98; 7 and 8 Vict. c. 85, s. 11; and 10 and 11 Vict. c. 85, s. 16.

(*d*) 1 and 2 Vict. c. 98, s. 1; and 7 and 8 Vict. c. 85, s. 11.

(*e*) 1 and 2 Vict. c. 98, ss. 6, 7, 8, 16, 18.

(*f*) *Ibid.* ss. 6, 7, 17.

(*g*) *Ibid.* ss. 8, 9.

(*h*) The statutes relating to this matter are 5 and 6 Vict. c. 55; 7 and 8 Vict. c. 85; and 16 and 17 Vict. c. 69. As to the conveyance of gunpowder and other combustible materials, see 7 and 8 Vict. c. 85, s. 12, and 23 and 24 Vict. c. 139, s. 20.

carriages are properly constructed in conformity with the provisions of the Railway Clauses Consolidation Act, and those of their special acts, on payment of such tolls as they are entitled to demand (*a*); and 2*d*, They are themselves empowered to employ engines and carriages of the required construction for the conveyance of goods and passengers, and to make such reasonable charges therefor as they may from time to time determine on, not exceeding the tolls authorized to be levied by their special act (*b*). In some cases, as we shall afterwards see, they are compelled to afford certain accommodations of this kind to the public. Practically, the former method, which contemplated the use of a railway as a public highway for payment of tolls, is in desuetude, or rather was never attempted to be put in practice. Its provisions, however, come into play when, by leases or otherwise, one company obtains running powers over the line of another company. The latter method, in which the company become public carriers on their own line, is that adopted for the purposes of ordinary traffic, and several important general enactments have been made for its regulation. We shall examine the statutory provisions applicable to both modes of using the railway in their order.

Tolls, rate of.

The tolls which a railway company are entitled to exact are specified in the special act (*c*), and in this respect the provisions of these acts present great varieties. In the case of railway companies established subsequently to 9th August 1844, the Lords of the Treasury may revise the scale of tolls and fix a new one, if, after twenty-one years from the passing of the special act, the profits exceed ten per cent. (*d*). The company cannot exact a higher rate of tolls than that allowed by their special act; but, subject to this limitation, they have the power of varying and altering the tolls from time to time as they see fit (*e*). It is, however, specially provided that all tolls shall be charged *equally to all persons*, whether imposed per ton or otherwise; that no advance or

(*a*) 8 and 9 Vict. c. 33, ss. 80, 85. The regulations as to the construction and use of carriages put on the railway by strangers will be found in secs. 107 to 118 inclusive. All locomotives used on the railway, whether by the company or strangers, if smoke-producing fuel be used, must be so constructed as to consume their own smoke (s. 107).

(*b*) *Ibid.* s. 79.

(*c*) 8 and 9 Vict. c. 33, s. 79.

(*d*) 7 and 8 Vict. c. 85, s. 1.

(*e*) 8 and 9 Vict. c. 33, ss. 79, 83, 85.

reduction shall be made, directly or indirectly, for or against any particular party; and that no monopoly shall be created either in favour of particular parties, or of the company itself (*a*). When railways are amalgamated, the tolls must be charged at a rate calculated as if the amalgamated railways had originally formed one line (*b*).

Means of enforcing payment.

A list of tolls must be conspicuously exhibited at the places where they are exigible (*c*); and posts at the distance of a quarter of a mile from each other must be set up along the whole line to mark the distances (*d*). If these provisions are not complied with, no tolls are exigible (*e*). The tolls are payable at such distances, in such manner, and to such persons as the company may appoint (*f*). If not paid, the company may detain the goods and carriages for which they are exigible, or other goods and carriages belonging to the defaulters, and recover payment by sale, accounting to the owners for the balance. Tolls may also be recovered by action (*g*). The owners of carriages or goods must, on demand, deliver to the toll-collector an exact account in writing, signed by them, of the goods conveyed, and of the point from which they have come and to which they are going; and where the goods conveyed are liable to the payment of different tolls, the account must contain a specification applicable thereto (*h*). The violator of these provisions incurs certain penalties in addition to payment of the tolls (*i*). Disputes as to the amount of tolls may be settled by the Sheriff or two Justices (*k*). If disputes arise as to the weight, quantity, or nature of the goods conveyed, the company may detain the goods or the carriage containing them; and if, on examination, the owner appear to have been in the wrong, he is liable in the costs of the examination; if the company, they must pay such costs, together with the damages of detention (*l*). If it appear to the Sheriff or Justices that the detention and examination were unnecessary or vexatious, the collector, or other official by whom it was made, may himself be found liable in the costs and damages, and these may be recovered by poinding and sale (*m*).

(*a*) *Ibid.* sec. 83.
(*b*) *Ibid.* sec. 84.
(*c*) *Ibid.* sec. 86.
(*d*) *Ibid.* sec. 87.
(*e*) *Ibid.* sec. 88.
(*f*) *Ibid.* sec. 89.
(*g*) *Ibid.* sec. 90.
(*h*) *Ibid.* sec. 91.
(*i*) *Ibid.* sec. 92.
(*k*) *Ibid.* sec. 93.
(*l*) *Ibid.* sec. 94.
(*m*) *Ibid.* sec. 95.

Powers to contract with other railways for summary powers.

The company may contract with any other railway for the passage along their respective lines of engines or carriages, on payment of such tolls as may be agreed on, or for division and apportionment of the tolls taken on their respective railways (*a*); but such contracts do not in anywise alter the tolls demandable from the public, or affect their right to use the railway as if no such contract had been entered into (*b*).

Fares when the company are carriers.

When the company are themselves carriers on their own line (which is the general case), they are bound to carry all passengers and goods requiring transit for payment of such reasonable charges as they may from time to time determine on, provided these do not exceed the scale of tolls authorized by the special act (*c*).

Scale of charges.

These charges may, like the tolls, be varied as the company see fit; but this power must not be exercised so as to favour or prejudice particular parties, or to create monopolies of the line (*d*). Generally, it may be said that the same rules and regulations (so far as applicable) apply to the imposing, publishing, and collecting of fares or charges, as in the case of tolls, so that their repetition is unnecessary (*e*). If any person travel or attempt to travel in a carriage belonging to the company without paying his fare, or, having paid it for a certain distance, attempt to travel farther without additional payment, or refuse or neglect to quit the carriage on arriving at the station to which he has paid his fare, he incurs a penalty not exceeding forty shillings (*f*). Such offenders may be detained until taken before a magistrate or discharged by due course of law (*g*).

Railway companies bound to afford reasonable facilities for passenger traffic.

Besides fixing a scale of tolls and charges in the special act, beyond which the company cannot raise their rates or fares, and independently of the provisions of the Railway Clauses Consolida-

(*a*) *Ibid.* sec. 80.

(*b*) *Ibid.* sec. 81. See *Finnie* v. *Glas. and S.-W. Ra. Co.*, 1855, 17 D. 1127.

(*c*) *Ibid.* sec. 79.

(*d*) *Ibid.* sec. 83.

(*e*) See interpretation clause for the word 'tolls.' It must be observed, however, that the forfeiture in sec. 88 does not apply to charges where the company are carriers.—*Scottish N.-E. Ra. Co.* v. *Anderson*, 1863, 1 Macph. 1056.

(*f*) *Ibid.* sec. 96.

(*g*) *Ibid.* sec. 97. It must be observed, however, that these provisions, being penal, cannot be enforced in the absence of intention to defraud. They may also become inoperative by regulations or usage to the contrary. See *Hamilton* v. *Caled. Ra. Co.*, 1857, 19 D. 457.

tion Act for ensuring proper accommodation to the public, railway companies are, by the previous Act of 7 and 8 Vict. c. 85, required to conform to certain regulations intended to secure reasonable accommodation to the poorer classes, and to the public generally. All passenger railway companies incorporated, or obtaining an extension of their power, in or after 1844, must run one train at least each way along their whole lines of railway, whether branch or trunk lines, once every week-day, and subject to the following conditions :—

Parliamentary trains.

The train shall start at an hour fixed by the directors and approved of by the Board of Trade. The average speed must be at least twelve miles an hour, including stoppages. It must, if required, take up and set down passengers at every passenger station. The carriages must be seated and protected from the weather in a manner satisfactory to the Board of Trade. Third-class passengers must be carried at a rate not exceeding a penny a mile (*a*). Each passenger is allowed half a hundredweight of luggage free (*b*), the excess to be charged by weight at rates not exceeding the lowest of the company's charges. Children under twelve years of age to be charged half fares, those under three years to go free, provided in both cases they accompany other adult passengers (sec. 6). Non-compliance with these provisions subjects the company in heavy penalties (sec. 7). With the exception, however, of the rates of charges, these provisions (sec. 8) may be altered by the Board of Trade. No tax is leviable on the receipts drawn from such cheap trains (sec. 9). When the company runs any passenger trains on Sunday, those cheap trains must also be provided (sec. 10). Independently of these provisions, many special acts contain similar regulations for the benefit of artisans, labourers, etc.

Obligations on railway companies as carriers.

At common law, railway companies are carriers, and subject to the provisions of the edict; and this all the more, that for all practical purposes they generally enjoy a monopoly (*c*). They are, indeed, expressly declared to be so by the Railway Clauses Con-

(*a*) By the 21 and 22 Vict. c. 75, ss. 1, 2, made perpetual by 23 and 24 Vict. c. 41, provisions are made for halfpenny charges for fractional parts of a mile.

(*b*) Husband and wife travelling together have been found entitled to one hundredweight.—*Great North Ra. Co.* v. *Shepherd*, 8 Exch. 31. The amount of luggage which may be taken free by passengers in ordinary cases is fixed by the special acts, among which there are great variations.

(*c*) *Campbell* v. *Caledonian Ra. Co.*, 1852, 14 D. 806.

solidation Act (sec. 82). But it soon became obvious, that from the very nature of such undertakings, the rules of the common law of carriers could not be applied without danger of injustice; and efforts were continually made by railway companies to limit their liability, by publishing notices that they would not hold themselves liable for the loss of property beyond a certain value, unless booked and paid for. Such notices were binding when they could be brought home to the knowledge of the owner of the property so as to constitute a special contract, but otherwise they were of no avail. This principle was, however, found not to work well in practice, and to produce great uncertainty, enabling the company in some cases to escape from the effects of gross negligence, and subjecting them in others to heavy liabilities where the owner of the goods was plainly in fault. To remedy these evils, special provisions were introduced into the Railway and Canal Traffic Act, 17 and 18 Vict. c. 31, which, by sec. 7, provides that a general notice to limit liability is a nullity; but that special contracts with owners of property may be made, limiting the company's liability, provided such contracts are signed by the parties, and found by the Court or judge to be reasonable. The section is no doubt most obscurely worded, but the above appears from the decided cases to be its true meaning (*a*). By the same section certain specified cases are enumerated, where the company's liability shall be limited to certain definite amounts, even when the property conveyed has not been made the subject of special contract.

17 and 18 Vict. c. 31.

By the Railway Clauses Consolidation Act, sec. 98, it is declared that the company shall not be bound to carry aquafortis, oil of vitriol, gunpowder, lucifer matches, or other dangerous goods; and that if any person transmits such goods without notice, he shall forfeit to the company £20 for every offence, and that the company may refuse to take suspicious parcels, or require them to be opened to ascertain their nature (*b*).

8 and 9 Vict. c. 33.

(*a*) See *Peck* v. *North Staffordshire Ra. Co.*, 10 House of Lords Ca. 473; *Simons* v. *Great Western Ra. Co.*, 26 Law Jour. (C. P.) 25; *M'Manus* v. *Lancashire and York Ra. Co.*, 4 H. and N. 327. See also Hodges, p. 507 *et seq.*, in which a full *resumé* will be found of all the more important cases, accompanied with examples of what the Courts have held to be reasonable and what unreasonable conditions of contract.

(*b*) See *Crouch* v. *London and North-Western Ra. Co.*, 14 C. B. 255.

17 and 18 Vict. c. 31, s. 2.

By the Railway and Canal Traffic Act, 1854, such companies are specially required to make proper arrangements, and to afford all reasonable facilities for receiving and forwarding traffic without unnecessary delay, and without any preference or prejudice to one party or to one kind of traffic over another (sec. 2). Parties complaining against such companies for contravention of these provisions are empowered to apply for redress by notice or summons, in a summary way, to the Court of Session in Scotland, or to any of the judges thereof. The same powers are given to the Lord Advocate, on a certificate from the Board of Trade alleging such contravention. The Court, when so put in motion, may order inquiries to be made by proper persons, and may interdict the offending company from continuing the proceedings complained of, and may issue process against any director, contractor, or other person failing to give obedience to the interdict. It may also order payment to be made by such offenders of a sum not exceeding £200 for every day during which the offence continues, to the Crown or to the party complaining. Similar provisions are also made to render the Act applicable to England and Ireland (sec. 3). The Court is authorized by Act of Sederunt to make such general rules as to the forms of procedure and process as may appear necessary for working out the statutory enactments (sec. 4); and provision is made for a rehearing, if desired, by a party considering himself aggrieved by any order made or proceeding taken by the Court or judge (sec. 5). But it is declared that the statutory provisions shall not affect the right of a party to use common law remedies against the company (sec. 6).

Interpretation of their provisions.

In interpreting this statute, it has been held that to warrant the Court to interfere, it is not necessary for the complainer to show a case of individual grievance, provided he make out a case of public inconvenience (*a*); and that in considering whether one individual received an undue preference, or suffered unequal prejudice, the interests of the company must also be taken into account (*b*). And inasmuch as the Act is intended to give redress only in cases where undue partiality is shown to particular parties, or undue prejudice is caused to others, complaints will not be entertained

(*a*) *Barret* v. *Great Nor. Ra. Co.*, 1 C. B. (N. S.) 423.

(*b*) *Ransome* v. *East. Counties Ra. Co.*, 1 C. B. (N. S.) 437; *Oxlade* v. *North-East. Ra. Co.*, 1 C. B. (N. S.) 454.

which merely allege general public inconvenience, without stating that one individual or class of individuals is placed at undue disadvantage as compared with others (*a*). As to what amounts to undue partiality or prejudice, see the cases undernoted (*b*).

5 and 6 Vict. c. 55.

For the further protection of persons engaged on or using railways as passengers or otherwise, certain special enactments have been made. By the 5 and 6 Vict. c. 55, ss. 17 and 18, provision is made for the detention and punishment of persons employed on a railway, and guilty of drunkenness and other misconduct; and of persons impeding or obstructing the officers of the company in the discharge of their duty, or trespassing on and refusing to quit the line (sec. 16). Several other enactments have been passed relative to these matters, but they do not appear to extend to Scotland.

Powers of Board of Trade.

In order more effectually to ensure that railway companies shall fulfil the purposes in respect of which they have received their statutory powers and privileges, they are required to make certain returns to the Board of Trade and other public officials as follows:— Every railway company must, when required, make such returns to the Board of Trade, as they may direct, of the aggregate traffic in passengers, in cattle, and in goods; of all accidents attended with personal injuries, and of all tolls, rates, and charges levied on the traffic, under heavy penalties (*c*). They must also give notice to the Board of accidents of the kind mentioned above within forty-eight hours after their occurrence (*d*). And the Board may likewise order any railway company to make a special return of all serious accidents occurring on their line, whether attended with personal injury or not, in such form as they may require (*e*). Every railway company must make up an annual abstract of the total receipts and expenditure of all sums levied under the Act, with a statement of the balance duly audited; and, if required, they must transmit a

(*a*) See *Attorney-General* v. *Great Nor. Ra. Co.*, 29 Law Jour. (Chan.) 794; *Hozier* v. *Caledonian Ra. Co.*, 1855, 17 D. 302.

(*b*) *Caterham Co.* v. *Brighton Ra. Co.*, 1 C. B. (N. S.) 410; *Harris* v. *Cockermouth Ra. Co.*, 3 C. B. (N. S.) 693; *Nicholson* v. *Great West. Ra. Co.*, 5 C. B. (N. S.) 366; *Gorton* v. *Bristol Ra. Co.*, 6 C. B. (N. S.) 639; *Beadell* v. *East. Counties Ra. Co.*, 2 C. B. (N. S.) 509; *Marriott* v. *London and South-West. Ra. Co.*, 1 C. B. (N.S.) 499; *Baxendale* v. *Great West. Ra. Co.*, 14 C. B. (N. S.) 1, and 16 *ibid.* 137.

(*c*) 3 and 4 Vict. c. 97, s. 4.

(*d*) 5 and 6 Vict. c. 55, s. 7.

(*e*) *Ibid.* s. 8.

copy of this document free of charge to the sheriff-clerks of the counties through which the line passes (*a*). And as the Lords of the Treasury are empowered to revise the scale of tolls, or purchase up certain railways at the end of twenty-one years from the date of their special acts, such railways are required to keep certain accounts relative to the expenditure and receipts during the last three years of the said term, and to transmit them half-yearly to the said Lords (*b*).

Lines of Telegraph.

Every railway company is required to permit the Board of Trade to lay down on their lands a line of electric telegraph for her Majesty's service, subject to such remuneration as may be agreed on or settled by arbitration. The telegraph may also be used by the company. If a telegraph has been established along the line by the company, or by other persons for their own use, it is burdened with a prior right for the service of her Majesty, and must be open for the service of all persons alike, subject to reasonable regulations and charges (*c*).

(*a*) 8 and 9 Vict. c. 33, s. 100.

(*b*) 7 and 8 Vict. c. 85, s. 5.

(*c*) 7 and 8 Vict. c. 85, s. 13. See further upon this subject, 26 and 27 Vict. c. 112. As to the powers of private telegraph companies to interfere with the *solum* of a railway, or to go under or over it, see *South-East. Ra. Co.* v. *European and American Elec. Teleg. Co.*, 9 Ex. 363; *Attorney-Gen.* v. *United Kingdom Elec. Teleg. Co.*, 30 Beav. 287.

BOOK IV.

JUDICIAL PROCEEDINGS.

CHAPTER I.

PRELIMINARY.

Subject-matter of Book IV.

It is proposed in this Book to pass in review the legal remedies available to associations formed for the purposes of gain, their members, and the public, in their mutual relations; to examine the powers of partners, managers, directors, etc., to represent and bind their firms or companies in such proceedings as partake of a judicial or *quasi* judicial character; and to consider the rules of evidence in so far as applicable to such associations.

Differences between Scotch and English law.

Here, as in other branches of our subject, it will be found that the English courts have decided many questions which have not yet been raised in this country; and it comes to be a matter of important consideration for the Scottish lawyer, how far he is safe in taking such decisions as precedents. As a general rule, it may be laid down, that when an English decision proceeds on equitable grounds, and does not contravene any characteristic technicality of Scottish law, it may form a valuable precedent; but that when it is based on a mere English technicality, and can be traced to no equitable principle, it will be more likely to mislead than assist. In order to apply this rule, it is obviously necessary that the principles which appear to regulate this branch of partnership law in the two legal systems should be ascertained as clearly as possible, so that the equitable may be separated from the technical, and the

end in view from the mode of procedure. For this purpose the following observations may be found useful.

Purposes contemplated in both systems.

It is very obvious, that the ultimate success of all associations formed for the purposes of gain must ultimately come to depend in a great measure on the facilities which the law affords for having the rights and obligations of the association, in relation to its members and strangers, determined and enforced by the public tribunals; and that any unnecessary obstructions to the freedom of judicial action must tend greatly to embarrass, if not entirely to defeat, the successful development of such resources as the society may possess. But, on the other hand, it must be observed, that unless some effectual means were taken to ascertain the will of the association, as contradistinguished from that of some of its members, when its name is used in judicial proceedings, the interest of the association itself, of its members, and of the public, might often be seriously compromised. By the act of a minority, or even of a single member, the company might be involved in a litigation from which nothing but loss could result; and claims unquestionably well founded might be abandoned or compromised from private and corrupt motives.

Inadequacy of the English system for unincorporated associations.

Both of these considerations appear to have been in contemplation of law, when the English and Scottish systems of judicial procedure assumed their existing forms; but it cannot be concealed, that while the English system has proved, in cases of unincorporated associations, so utterly inadequate to meet the requirements of commerce, that the interference of the Legislature by the Registration Acts became indispensable; the principles adopted in Scotland were in themselves so correct in theory, and so easily made available in practice, that, in so far as concerned judicial procedure, these pieces of legislation were apparently uncalled for.

In corporations, rules of both systems very similar.

In so far as regards corporations, the rules in both systems are very similar, if not identical; and as they will be afterwards fully considered, any notice of them at present is unnecessary. The great points of difference between the two systems are to be found in the case of unincorporated associations, and to them therefore we shall now briefly refer.

English rules as to unincor-

In England, since the law does not recognise a *quasi* person in an unincorporated society, the company rights and claims are con-

sidered to be the joint rights and claims of the individual partners, and its debts and obligations to be their joint and several debts and obligations. In suing or defending, therefore, the names of all the partners must appear as plaintiffs or defendants. It is held, however, that every partner is entitled to use the names of all his copartners for this purpose, and, in cases of urgency at least, without obtaining their consent. But, on the other hand, any one or more of their number may refuse or withdraw his name; and this will in most cases be fatal to the action or defence. The general effect of this rule is to ensure that judicial action shall not be taken in the company name, unless such a step be truly in accordance with the intentions and will of all its members; but, on the other hand, its just claims are liable to be defeated through the obstinacy of a single partner,—a result which a court of equity will not always agree to remedy. The bad consequences of this rule are still more strikingly illustrated when claims arise between the company and its own members. In such circumstances, as all the partners cannot be made plaintiffs or defendants, the common law affords no remedy, and a court of equity will in general only interfere on condition of dissolution (*a*).

porated companies.

A release being a deed under seal, one partner cannot bind the others by executing such a deed without express authority also under seal. But the salutary check afforded by this technical principle is often neutralized by the operation of another. For though a release does not bind the other partners, it binds the partner who grants it; and as an action for a company claim can only be raised and prosecuted in name of all the partners, the action will fall by plea in abatement, whenever a release even by one partner has been granted, either before it is raised or while it is yet in dependence (*b*). The mischievous consequences of this technical rule were probably not foreseen when it was first applied in questions of partnership; but it has now become so fixed, that one great purpose in passing the Registration Acts was to neutralize its effects.

Rules as to releases.

The English courts have not, however, extended the operation of the principle here mentioned to cases which appear to be strictly analogous. Thus, it is held that one partner cannot bind the

Reference and compromise.

(*a*) Lindley 384 and 408.

(*b*) Lindley 226, 234. Sometimes the Court will avoid the release on clear proof of fraud. *Ibid.*

others by consenting to refer a claim to arbitration, or by consenting to judgment or giving a *cognovit*, either in his own name or in that of all the copartners; the reason alleged being, that such acts transcend the limits of implied agency,—a principle based in the highest equity. But it is difficult to see why a distinction should be made between the power of granting a release, and that of referring to arbitration, or giving a *cognovit*. All three appear to be equally acts transcending implied agency; and if the act of a partner can incapacitate the company from judicial action in the one case, it may well be asked why it should not equally incapacitate them in the others.

Effect of release where company is defendant.

Lastly, we find the technical principle which requires the joinder of all the partners of a firm in judicial proceedings, reappearing when the company is defendant, but on this occasion in its favour. It is settled law in England, that a release granted by a creditor to one partner of a firm for a company debt, is a release to all; and this is based on the consideration, that as a company can only be sued by making all the partners defendants, so when one has been released the action must fall, as he cannot be made a defendant.

Scottish law.

By the law of Scotland, on the other hand, unincorporated associations for purposes of gain are conceived of as possessing a *quasi* person distinct from the members of which they are composed; and, as we shall afterwards see, methods are provided by which, in the general case, the company may sue and be sued, without all the members being made pursuers or defenders. If, however, there is reason to believe that a minority are suing or defending in the company name against the will of the majority, the Court will, on the application of the opposite party, sist procedure until the matter be cleared up, when, if it appear that the proceedings are not sanctioned by the will of the company, the action will be dismissed, or the defence repelled, as the case may be, with costs against those who, without authority, made use of the company name.

Right to sue and defend does not abate by non-concurrence or discharge of a partner.

As the company is capable of sustaining the characters of creditor or debtor, both to the world and to its own partners, in virtue of its *quasi* personality, its right to sue and defend is not affected by the fact that one of the latter refuses or withdraws his concurrence; and a discharge of a company claim by one partner will only at best have the effect of limiting the debtor's obligation

by the amount of that partner's share. In like manner, a discharge of one partner by a company creditor will not bar action against the company, but will merely diminish the claim to that extent. And for the same reason, actions may be maintained between companies and their partners as freely in all respects as between companies and strangers.

General results.

It thus appears, that in this branch of the subject, in so far as unincorporated firms or companies are concerned, the utmost caution must be exercised in making use of English authorities, and that, except where the decision is based exclusively on some equitable principle of law universally applicable, their effect will only be to confuse, if not entirely to mislead. In England, we find the tribunals anxious to give effect to sound equitable principles, but embarrassed in their application by the presence of technical rules, and even where successful in meeting the equity of particular cases, unable, by reason of a defective theory, to refer their decisions to any clear or intelligible legal principles. In Scotland, on the other hand, we find the law giving expression, in so far as it has hitherto been practically evolved, to sound equitable principles, and in possession of a theory at once consistent with itself, and capable of affording an easy solution of such questions as may arise in practice (*a*).

(*a*) For the Scotch authorities, see the following chapters.

CHAPTER II.

POWERS OF PARTNERS, ETC., TO BIND THE COMPANY IN JUDICIAL PROCEEDINGS.

SUING AND DEFENDING.

Private partnerships.

ALL partners of private firms have, in the first instance, implied power to sue and defend in name of the company; but this power is merely implied, and ceases as soon as the will of the company is ascertained in accordance with its constitution to be otherwise. Before, therefore, one or more partners, less than the whole, proceed to make use of the social name judicially, they ought, unless the urgency of the case prevents it, to obtain the consent of the body of members, by calling a general meeting, or in some other manner equally effective. Where a defender makes averments sufficiently specific, to the effect that a minority of the partners are suing in the company name, without the knowledge or against the desire of the majority, the action will be sisted until the other partners be joined as pursuers; and unless this, after a reasonable time, be done, or some valid reason can be assigned for their non-appearance, the action will be dismissed as not being authorized by the company (*a*). The same principle would seem to apply in the case of a minority maintaining a defence against the known will of the majority of members.

What is the will of the company.

It must be observed, however, that the *will* of the company is not always to be taken as fixed by that of the majority of the

(*a*) *May* v. *Mathews*, 1834, 13 S. 94. See also *Scotland* v. *Walkingshaw*, 1830, 9 S. 25; *Balfour* v. *Kerr*, 1856, 18 D. 619. See *Shotts Iron Co.* v. *Hopkirk*, 6 S. 399; *Malcolm* v. *West Lothian Ra. Co.*, 1835, 13 S. 887; *Sclater* v. *Clyne*, 1831, 9 S. 248; *Scottish Emigration Society*, 1855, 18 D. 239; *Aitchison* v. *Burnside's Trs.*, 1832, 10 S. 296.

partners. This is only so where the majority acts within the sphere of the purposes for which the society was constituted, and so long as their resolutions are not opposed to those purposes, or plainly contrary to what must be taken to have been the intention of parties when the company was formed. Thus, a resolution to abandon undoubted claims in order to carry out some scheme or purpose not contemplated at formation, or to prosecute or defend an action from corrupt motives, could not be taken to be the will of the company (*a*). In cases of this kind the majority would, if their purposes were carried out, render themselves liable in damages to their copartners (*b*); and if a sufficiently clear case were established, the Court would prohibit them from disclaiming the instance, and allow the other partner or partners to proceed with the action or defence in the social name. If the case were open to doubt, the Court would perhaps, before allowing the proceedings to go on, require the minority to find caution to the majority for expenses in the event of their going against the company (*c*).

But in all such cases there must be some *prima facie* case of *probabilis causa* made out; otherwise, to allow a minority to insist on proceeding against the will of the majority, would be in effect to interfere with the company's right to manage its own concerns, and to warrant one or two partners to make use of the company's name in doing what the company repudiated.

Power of partners only implied.

As the power of partners to sue and defend in name of the company is only implied, it will be held not to exist, or to have been withdrawn, when circumstances seem to warrant this construction. Thus, when an action of damages was raised by fourteen persons out of an association consisting of seventy-five members, for injury done to the association, it was dismissed in respect that the whole members were not made parties to the suit (*d*).

The implied power to sue and defend, ceases, like other implied powers, on the dissolution of the partnership; and, therefore, if a

(*a*) See, on this subject, chapter on Powers of Majorities.

(*b*) See *May* v. *Mathews*, and *Scotland* v. *Walkingshaw*, *supra*.

(*c*) See the English cases of *Whitehead* v. *Hughes*, 2 Cr. and M. 318; *Harwood* v. *Edwards*, Gow on Part. 65, note; *Goodman* v. *De Beauvoir*, 12 E. Jur. 989 and 1037.

(*d*) *May* v. *Mathews*, 1834, 13 S. 94; *Reid* v. *Douglas*, 1814, F. C. 643; *Johnston* v. *Duncan*, 1824, 2 S. 532; *Geddes* v. *Hopkirk*, 1827, 2 S. 697.

partner raise an action during the subsistence and for behoof of the partnership, and it is dissolved *pendente processu*, he cannot continue the litigation without special authority from the other partners (*a*). Nor can the creditor of a deceased partner sue for a debt due the company, without the express authority of the surviving partners (*b*). As, however, a company, though dissolved, still continues to exist for the purposes of winding up, the whole body of former partners may delegate to one or more of their number, as they may to a stranger, the power of suing for its outstanding debts. Such arrangements are common in practice (*c*).

It may here be observed, that an individual trading in name of a firm, since he may be sued *socio nomine*, may also maintain an action in name of the supposed firm; and this is also competent to his executor (*d*).

Corporations and common law companies.

In the case of corporations, the members have no implied power to sue or defend in the corporate name; for the executive management of such associations being almost always committed to a board of directors, or to other officials, the individual partners are in no sense to be taken as the agents of the corporation. Neither do the directors or other managers appear to possess power of this kind by implication; for, as we have already seen, they are regarded as special agents for the discharge of the particular duties with which they are entrusted. Frequently, however, express powers are conferred upon them to sue and defend in the corporation name; but when this is not so, they ought to take authority from a general meeting in each particular case (*e*). When a general power to this effect is conferred on boards of directors, managers, or other officials, attention must be given to any conditions which may have been imposed on its exercise; *e.g.* the concurrence of the chairman, the advice of the company's lawyers, the consent of a specified majority, or the like. Though the power has been conferred on the managing body, this does not imply that it may be exercised by an indi-

(*a*) *Gibson* v. *Stewart*, 1822, 1 S. 352.

(*b*) *Roger* v. *Jamieson*, 1838, 16 S. 418.

(*c*) 2 Bell's Com. 637-8; *Kinnear* v. *Thomson*, 1830, 8 S. 512.

(*d*) *Mills* v. *Hamilton*, 1830, 9 S. 111. See also *Booth* v. *Commercial Bank*, 1823, 2 S. 273; *Rose* v. *Moore*, 1833, 11 S. 344.

(*e*) *Bow and Others* v. *Patrons of Cowan's Hospital*, 1825, 4 S. 280; *Graham* v. *Writers to the Signet*, 1825, 1 W. and S. 538, reversing 2 S. 214.

vidual member of that body. When common law companies consist of such a numerous membership, that they are like corporations managed by directors, the same rules seem to apply (*a*). It may be observed, that while in this, as in other matters of agency, directors who exceed their powers may render themselves liable in damages to the company, it by no means follows, that *quoad* the public the company will not be bound by their acts. The maxim would here seem to apply, *Omnia presumuntur rite esse acta* (*b*).

Commissioners and officials.

Powers may be given by corporations, as well as by individuals, to a commissioner, or to a committee, to sue for their behoof; and in such cases the action does not require to proceed in the corporate name, provided it clearly appear in the instance that the commissioner or committee are suing for behoof of and as appointed by the corporation (*c*). The case, as we shall afterwards see, is different with unincorporated companies.

Commencement and termination of power to sue and be sued.

The right of a corporation to sue or be sued commences at the date when it is, by its incorporating instrument, declared to come into existence (*d*), and terminates by its dissolution (*e*).

POWER TO REFER TO ARBITRATION, AND TO COMPROMISE.

Settling extrajudicially.

A question of some difficulty presents itself, when it is asked whether the will of the majority is the will of the company, to the effect of settling disputes affecting the concern by arbitration or by compromise.

Arbitration.

First, as to arbitration. Here the real question is not, whether an individual partner can refer company matters to arbitration—that has been conclusively settled in the negative,—but whether, in the absence of special provisions in the instrument of formation, it can be presumed to have been intended that a majority should have power to withdraw the determination of disputed claims affecting the company from the cognizance of the public tribunals,

(*a*) See *Burnes* v. *Pennel*, 1841, 6 Bell's App. 541, 563.

(*b*) See *Clarke* v. *Imperial Gas Co.*, 4 B. and Ad. 315; *Hill* v. *Manchester Water Co.*, 5 B. and Ad. 866; *Agar* v. *Athenæum Insur. Co.*, 3 C. B. N. S. 725; *ex parte the Eagle Co.*, 4 K. and J. 549.

(*c*) *Bow and Others* v. *Patrons of Cowan's Hospital*, 1825, 4 S. 280.

(*d*) *Dundee Ra. Co.* v. *Miller*, 1832, 10 S. 269.

(*e*) *Edin. and Perth Ra. Co.* v. *North British Ra. Co.*, 1846, 9 D. 307.

and to entrust them to the arbitrament of private persons. We should be led to the conclusion, that no such presumed power exists, on the general grounds that its exercise is nowise necessary for the ordinary purposes of a mercantile association, and is never deemed to be conferred by any contract in which it is not specially mentioned. This view is supported by the English authorities, though it may be said that their non-recognition of the firm has considerably affected the *ratio decidendi* (*a*). The Scotch case of *Lumsden* v. *Gordon* (*b*) is not necessarily decisive of the question, for there the Court merely decided that a single partner could not bind the company by a reference; neither is the case of *Mackintosh* v. *Robertson* (*c*) an authority in point, as the question there lay not between partners, but joint-tenants. It may be observed, however, that the view which denies to the majority the power of binding the company by reference to arbitration, receives great countenance from the fact that the Legislature has deemed it necessary to confer this power *per expressum* in the Consolidation Acts applicable to joint-stock companies formed in Scotland for public undertakings.

Compromise.

Second, as to compromise. The question, whether majorities have power to compromise questions affecting company rights, stands in a somewhat different position. So far from this being to be considered an extraordinary power, its exercise may, in numerous cases, be of essential advantage, if not of absolute necessity, for the due management of the company business. There are many debts whose recovery in full is impossible, as there are many obligations whose complete enforcement is hopeless. And many claims may be made against a company, which, though not strictly exigible, ought in common prudence to form the subject of compromise rather than of litigation. To deny, therefore, to a majority the power of conclusively settling such matters on the best terms that can be procured, would in many cases be to sacrifice the common interest to the crotchets of one or two wrongheaded individuals,—a proposition that it cannot be supposed was seriously intended at formation of the association. It would therefore seem that, in the absence of any express provision to the contrary, this

(*a*) *Stead* v. *Salt*, 3 Bingham 101.

(*b*) 1728, M. 14567.

(*c*) 1834, 12 S. 321.

power of compromise must be presumed to be vested in the majority. We are not, however, aware that the pure question here under consideration has ever been judicially settled either in this country or in England.

Partners have no power to refer or compromise.

A partner has no power to bind the company by referring claims made either by or against it to arbitration. This is an act of extraordinary administration, which entirely transcends the sphere of general agency, and will receive no effect unless agreed to or ratified by the company. It makes no difference whether the claim has only been made, or whether action has already been raised for its enforcement (*a*). In like manner, he has no implied power to compromise; for on the common principles of agency, authority to receive payment of debt does not imply authority to settle it otherwise (*b*).

REFERENCE TO OATH.

Reference to oath creates a contract.

According to the law of Scotland, while a civil action is pending, it is competent for either pursuer or defender to refer the matter in dispute to the oath of his adversary. When this is done, a judicial contract is said to be entered into between the parties, whereby they are held to agree that, renouncing every other mode of proof, the matter in dispute shall be settled by the oath of one of them (*c*).

Has a partner power to refer to oath?

The question never appears to have been settled by any reported decision, whether a partner has implied power to bind the firm by agreeing on its behalf that the subject-matter of a lawsuit in which it is a litigant, shall be settled by reference to the oath of the opposite party. We are therefore left to be guided by general principles. In considering this question, a distinction must be made between a reference to oath *in initio litis*, before a finding or verdict has been obtained on the evidence, and a similar reference after the

(*a*) *Lumsden* v. *Gordon*, 1728, M. 14567. See also *M'Intosh* v. *Robertson*, 1834, 12 S. 321. 2 Bell's Com. 618. English authorities: *Stead* v. *Salt*, 3 Bing. 101; *Antram* v. *Chace*, 15 East 209; *Strangford* v. *Green*, 2 Mod. 228; *Hatton* v. *Royle*, 3 H. and N. 500. Russell on Arbitration 19 sqq.

(*b*) See *Nottidge* v. *Prichard*, 2 Cl. and Fin. 379; *Wallace* v. *Kelsall*, 7 M. and W. 264.

(*c*) *Per* Lord Justice-Clerk in *M'Nab* v. *Lockhart*, 1843, 5 D. 1021.

company has failed in every other kind of proof. With regard to a reference of the company's cause to the oath of its opponent before a decision has been given on the ordinary evidence, or at least before it has become clear that such evidence is not to be obtained, there seems no reason to doubt, from theory as well as from analogy, that no such implied power exists.

General considerations.

In the first place, it is by no means necessary as a means of carrying on the business of the firm; and, like the power to refer to arbitration, it seems altogether to transcend the sphere of ordinary management. It may, no doubt, in many cases be the means of terminating a costly litigation in a cheap, brief, and satisfactory manner; but, on the other hand, it may as often involve the risk of perilling on the veracity of a doubtful opponent an action or defence which could be made good by the ordinary legal machinery. Even law-agents, who are employed to act for litigants in the conduct of a cause, require special authority to enable them to bind their clients by such a reference (*a*); and though an exception is made in favour of counsel, this arises from the exuberant authority with which, for the client's benefit, they are held to be invested: yet even in their case there is no instance of the exercise of this power *in initio litis* (*b*). In fact, it would seem that this is a matter in which, when practicable, all the partners should consult and determine, as it may often equal in importance the question whether a claim or a defence should be simply abandoned. Perhaps an exception may be made in cases where some of the partners are abroad, or where the management of the company is committed to managing partners; but even this is very doubtful.

Have directors this power?

As to directors of incorporated companies, the case is somewhat different; and in the absence of any decision to the contrary, it is probable that when they have full powers to institute legal proceedings for their companies without taking special instructions for that purpose, the power in question will be inferred in cases which do not vitally affect the interests of their constituents.

When a final judgment has been given against the copartnery, it would seem that any partner may insist on referring the matter

(*a*) *Hardy* v. *Allan*, 1709, M. 12248; and cases immediately following.

(*b*) *Gilfillan* v. *Brown*, 1833, 11 S. 548; *Currie*, 1846, 9 D. 308; *Forbes* v. *Duffus*, 19 Jan. 1837, F. C.

in dispute to the oath of the opposite party. Here no great harm beyond an increase of expense is likely to ensue; and as it always affords a chance of success, it would be hard to deprive any partner of its benefit, if he conscientiously believes it will be of avail. Besides, as the competency of such a reference is always within the equitable discretion of the Court, there is not much danger of its being abused to the injury of either party (*a*).

Mode of procedure when reference is made to oath of company.

When a reference has been made to the oath of a firm or ordinary partnership, the general rule is, that the oaths of all the partners must be taken. This is particularly the case where it is sought to prove by the oath of the company that payment of a debt duly constituted against it had not been made; for in such a case, unless all the partners were examined, it would be impossible to ascertain that some of their number had not made payment without the knowledge of the others (*b*).

And the rule becomes all the stronger after the firm has been dissolved; for here agency having ceased, there is not even ground for assuming that one partner holds authority to bind the others by deposition (*c*).

Limitations of the rule.

It is not to be inferred, however, from this, that when from death it has become impossible to examine all those who were partners at the contraction of the debt, the oaths of the survivors may not be taken on the question of resting owing. To give effect to such a view, would be in many cases to deprive a creditor of his only mode of proof; and although it is possible that payment may have been made by a deceased partner, it is the fault of the survivors that they did not examine into the matter in time, and preserve legal evidence of the fact (*d*).

When business carried on by one partner.

Where the whole business transactions of a company have been entrusted to the exclusive management of one of the partners, it would seem that the reference may be confined to his oath (*e*); but if the reference has been made *de facto* to the oaths of all the

(*a*) *Ritchie* v. *Mackay*, 1829, 3 W. and S. 490.

(*b*) *M'Nab* v. *Lockhart*, 1843, 5 D. 1014; *Broom* v. *Edgley*, 1843, 5 D. 1094, opinion of Lord Justice-Clerk.

(*c*) *Nisbet's Trustees* v. *Morrison*, 1829, 7 S. 307; *Easton* v. *Johnston*, 1831, 9 S. 440; *M'Nab* v. *Lockhart*, *supra*; *Neill* v. *Campbell*, 1849, 11 D. 979.

(*d*) *Stewart*, 1823, 2 S. 483.

(*e*) *Gow* v. *M'Donald*, 1827, 5 S. 472, as compared with *Kendal* v. *Campbell*, 1766, M. 12351.

partners, it will not be exhausted by the deposition of one of their number (*a*).

Question of constitution of obligation by agency of one partner;

The case becomes somewhat different when the question is not one of resting owing, but whether a debt or obligation had been constituted, or an agreement had been entered into. Here, if the alleged transaction fell within the agency of a single partner, there seems no reason to doubt that it would be properly referred to his individual oath. And, indeed, it is difficult to see of what use the oaths of the other partners could possibly be, where it is admitted that the transaction was covered by the partner's agency, and it is alleged that it was with him only that it took place. This is a principle of common agency (*b*).

and by agency of directors.

As directors of public companies are the sole agents of the company for the transaction of business, they are undoubtedly the proper parties to whose oath the constitution of obligations against the company should be referred. But it should be observed, that when the obligation sought to be established is one which could only, from the constitution of the company, be undertaken through the joint agency of a board or a majority of directors, or is competent only when it receives the assent of a *sine quo non*, the reference ought to be in similar terms, unless where the public were entitled in contracting with the company to presume otherwise. The same rule will apply where the transaction alleged could only have been validly entered into with a certain servant or official of the company, *e.g.* the secretary of a railway, or the cashier of a banking company.

ADMISSIONS.

When partner's admissions bind the company.

When representations are made by one partner in relation to matters falling within the limits of the company's business, they will bind the company (*c*); and admissions made by a partner in such circumstances are conclusive evidence against the company,

(*a*) *Cleland* v. *M'Clellan*, 1851, 13 D. 504.

(*b*) *Smith* v. *Falconer*, 1831, 9 S. 474, and 1833, 11 S. 323; *Campbell* v. *Ballantyne*, 1839, 1 D. 1061; *Dickson* v. *Ker*, 1830, 9 S. 125. See *antea*, p. 279.

(*c*) *National Ex. Co.* v. *Drew*, 1850, 12 D. 950,—1851, 13 D. 770; aff. 1855, 2 Macq. 103.

unless they can be disproved (*a*). But it has been held, that entries in the private books of one partner are not evidence against the heirs of another, where the question was between the heirs of both partners (*b*). This decision was, of course, prior to the recent changes in the law of evidence.

Condition precedent.

Before, however, the admission of one partner can be made available against another, the fact of partnership must be admitted or established (*c*); and, in general, the admissions of an alleged partner will not be received to prove its existence against another (*d*). Admissions by a person who afterwards becomes a partner with another, are no evidence against the latter with reference to what took place prior to the date of the partnership (*e*).

Admissions by directors.

As directors are special agents, companies are affected by their admissions in such matters only as fall within the sphere of their agency (*f*).

POWER TO TAKE PAYMENT OF DEBTS DUE TO THE FIRM, AND HEREIN OF GRANTING RELEASES SO AS TO BIND THE FIRM.

Partner has power to discharge on payment.

As a partner has implied power to contract debts and obligations on the part of the firm, so also has he implied authority to receive payment of and discharge such debts as are owing to the company. This is so obvious a deduction from the principle that every partner is implied agent for the company within the sphere of its business, that it appears never to have been questioned in this country. In England, it has been specially decided to be law (*g*).

It is a consequence of this implied power, that a tender of payment to one partner is a tender of payment to the firm, so as to stop the currency of interest, and involve the firm in the costs

(*a*) 2 Bell's Com. 618; *Nisbet's Trs.* v. *Morrison's Trs.*, 1829, 7 S. 307, *per* Lord Glenlee; *Lucas* v. *De la Cour*, 1 M. and Sel. 248; *Wood* v. *Braddick*, 1 Taunt. 104. Lindley 236. *National Bank* v. *Hope*, 1837, 16 S. 177.

(*b*) *Smith* v. *Logan*, 1826, 5 S. 29, 4 W. and S. 47.

(*c*) *Grant* v. *Jackson*, Pea. Ca. 203; *Nicholls* v. *Dowding*, 1 Stark. 81; *Campbell* v. *M'Farlane*, 1840, 2 D. 663.

(*d*) *Dundas* v. *Belch*, 1806, 2 Bell's Com. 399, n. 4; *Smith* v. *Puller*, 1820, 2 Mur. 342.

(*e*) *Tunley* v. *Evans*, 2 Dowl. and L. 747; *Catt* v. *Howard*, 3 Stark. 3.

(*f*) *Meux's Exrs.*, 2 De G. M. and G. 522; *Bell* v. *London and North-Western Ra. Co.*, 15 Beav. 548.

(*g*) *Anon.*, 12 Mod. 446; *Hawkshaw* v. *Parkins*, 2 Swanst. 539; *Henderson* v. *Wild*, 2 Camp. 561.

and consequences of any proceedings they may aftewards take forr recovery or in security of the sum already offered. *E converso*, a tender of payment by one partner is a tender by the firm (*a*).

He has no power to discharge except on payment.

But it must be observed, that while a partner has power to discharge company claims on payment or performance, he has no implied authority to settle them otherwise, as by compromise (*b*), or set-off against counter claims due by himself as an individual.

Does power survive dissolution?

As partnership survives after dissolution for the purpose of winding up (*c*), it may be argued that payment to one partner even after dissolution can be made in safety, as he has still implied agency to grant a discharge on receiving payment of the company's claims (*d*). But it is questionable how far this can be taken as settled in the law of Scotland, since the case of *Oswald's Trustees* v. *Dickson*, where, from the opinions of the judges, it would seem that they thought something more was necessary to entitle a partner to discharge a company debt, than the mere fact that he was a partner while the concern subsisted (*e*). In the case of *Morris* v. *Stewart*, an action having been raised by a company, one of the partners died during the litigation, and his widow was sisted as his executrix. Decree having been pronounced against the defender, the Court held that he was not bound to be satisfied with a discharge by the surviving partner, but that he was entitled to insist that the widow should confirm, and be a party to the discharge (*f*). Be this as it may, there can be no doubt that, since a discharge or release is not *probatio probata*, the company will not be held bound, when it can be shown that in granting such an acquittance the partner had acted collusively with the obligant (*g*).

It has been held in England, that a partner may bind the firm by taking a bill from a company debtor in lieu of money payment (*h*).

(*a*) See the English cases of *Douglas* v. *Patrick*, 3 T. R. 683; and *Pierse* v. *Bowles*, 1 Stark. 323.

(*b*) *Nottidge* v. *Prichard*, 2 Cl. and Fin. 379; *Wallace* v. *Kelsall*, 7 M. and W. 264. See p. 528.

(*c*) 2 Bell's Com. 637; *Buchanan* v. *West of Scotland Iron Co.*, 1855, 17 D. 461; *Gordon* v. *Douglas, Heron, and Co.*, 1795, aff. 3 Paton's App. 428.

(*d*) *Duff* v. *East India Co.*, 15 Ves. 198; *Brasier* v. *Hudson*, 9 Sim. 1. See *Gibson* v. *Stewart*, 1822, 1 S. 352.

(*e*) Dec. 3, 1833, 12 S. 156.

(*f*) 1852, 14 D. 576.

(*g*) *Farrar* v. *Hutchinson*, 9 A. and E. 641; *Henderson* v. *Wild*, 2 Camp. 561; *Aspinall* v. *London and N.-W. Ra. Co.*, 11 Ha. 325.

(*h*) *Tomlin* v. *Lawrence*, 3 Moo. and P. 555.

Reasoning from analogy, it would seem that a partner has no implied power to innovate or delegate a debt due to the firm; that is, to accept one obligation for another, or take one debtor in room of another. This would not only imply a power to settle a debt otherwise than by payment, but might have the effect of destroying existing securities, and of liberating cautioners. Something might, however, in such a case, depend on the custom of the trade in which the firm was engaged.

Partner cannot innovate or delegate.

When an action has once been raised by the company against one of its debtors or obligants, no discharge or release can be granted by an individual partner, to the effect of staying the suit at the company's instance (*a*). If the release be granted in name of the individual partner, it will be of no avail, because it does not even bear to be the deed of the pursuer, who is the company. If, again, it be granted in name of the company, it must be equally valueless, because the *will* of the company being already known by the raising of the action, all implied power in the partner to represent it in the matter *sub judice* has necessarily ceased. It may even be said that a company debtor is not in safety to pay to one partner, after action has been raised in the company's name, unless at least the payment includes the amount of costs that have been already incurred. It would seem to be the safest course for the defender in such circumstances, to insist for a discharge in name of the other partners, or for decree of absolvitor.

Release by partner after action raised does not bind company;

But while a release by a single partner can have no effect to bind the company, there seems no reason why it should not bind him as an individual, so as to found a claim of indemnity at the instance of the company debtor against him, at least *pro rata* of his share, or to the effect of extinguishing the debt or obligation altogether, if by succession or otherwise they should come to be centred in his person.

but may bind him individually.

In England a very different principle prevails. There a release by one partner is held in law to be a release by all; and it makes no difference whether such release has been granted before or after judicial proceedings have been adopted, or whether it has been for an onerous or a gratuitous cause. This principle is apparently

Contrary English rules.

(*a*) See, as to this, the Report of the Mercantile Law Commission, 1854-5, s. 78.

traceable to the non-recognition of the separate person of the company, and has been justly condemned by high authority as productive of great injustice (*a*). Even, however, in the English system, a release will be set aside where fraud or collusion can be plainly shown to have been the inducing cause (*b*).

NOTICE.

To whom notice must be given so as to bind the company.

As a general rule, notice to one partner of a private firm is notice to the firm, on the common principle that notice to an agent is notice to his principal (*c*). This does not, however, apply where the transaction is beyond the implied agency, when it is personal to the partner receiving the notice, or when by retirement the agency has been withdrawn (*d*); nor to cases of fraud (*e*). Intimation to its manager is intimation to the company apparently in all cases (*f*). Notice to a shareholder of a common law company managed by officials is not sufficient (*g*), but notice to one of its directors is enough (*h*). Intimation of an assignation of shares or stock must either be made to the manager or to all the partners, inasmuch as such a transaction may seriously affect the internal management or the balance of the membership (*i*). Intimation is, however, not necessary to complete the transfer of his share from one partner to the other, when there are only two partners, and the conveyance is immediately acted on (*k*).

(*a*) See Report of Commissioners noted *supra*, s. 78. *Arton* v. *Booth*, 4 Moore 192; *Phillips* v. *Clagett*, 11 M. and W. 84; *Furnival* v. *Weston*, 7 Moore 356.

(*b*) *Barker* v. *Richardson*, 1 Y. and J. 362.

(*c*) *Mayhew* v. *Eames*, 1 Car. and Pa. 550; *Alderson* v. *Pope*, 1 Camp. 404; *Bignold* v. *Waterhouse*, 1 M. and S. 259; *Porthouse* v. *Parker*, 1 Camp. 82; *Jacand* v. *French*, 12 East 317.

(*d*) *Bignold* v. *Waterhouse*, 1 M. and S. 255; *Collinson* v. *Lister*, 20 Beav. 356; *Adams* v. *Bingley*, 1 M. and W. 192.

(*e*) See *ex parte Heaton*, Buck. 386.

(*f*) See *Hill* v. *Lindsay*, 1846, 8 D. 472; *Collinson* v. *Lister*, *supra*.

(*g*) *Powles* v. *Page*, 3 C. B. 16. See *Burnes* v. *Pennel*, 1849, 2 H. of L. Ca. 497.

(*h*) See *Worces. Corn Exchange Co.*, 3 De G. M. and G. 180.

(*i*) *Hill* v. *Lindsay*, *supra*.

(*k*) *Russell* v. *Breadalbane*, 1825, 1 W. and S. 620; 1831, 5 W. and S. 256; aff. 2 S. 62, and 5 S. 891.

CHAPTER III.

HOW PARTNERSHIPS AND COMMON LAW COMPANIES MAY SUE AND BE SUED.

Fundamental principle of English and Scotch law.

It is a fundamental principle of Scotch as well as of English law, that the right of suing and being sued in the corporate or descriptive name is a privilege competent to no other associations than such as are incorporated or privileged by public authority, that is, by special act, charter, letters patent, or registration (*a*).

Where the two systems diverge.

But beyond this, the two systems widely diverge. The law of England sees in an unincorporated association nothing but the individual members of which it is composed, and has generally held inflexibly to the rule, that it can only appear judicially when every member has been made a plaintiff or defendant, as the case may be (*b*). The law of Scotland, on the other hand, inasmuch as it sees in such associations not only the individual members, but their aggregation, forming the *quasi* person of the company, requires indeed that the members shall be before the Court, but in most cases is satisfied by the appearance of some, as representatives of the whole.

Consequences of English rule.

The consequences of the English principle have been unsatisfactory in the extreme. In questions with the public, the company

(*a*) *Masons of Lodge of Lanark*, 1730, M. 14554; *Wilson* v. *Jobson*, 1771, M. 14555; *Heritors etc. of Dalry*, 1791, M. 14557; *Stevenson* v. *Arran Fish. Co.*, 1757, M. 14560; *Lawson* v. *Gordon*, 1810, 15 F. C. 741; *Culcreuch Cotton Co.*, 1822, 2 S. 47; *Sea Insurance Co.*, 1827, 5 S. 348; *Commercial Bank*, 1828, 3 W. and S. 365; *Tannoch* v. *Reed*, 1829, 7 S. 606; *Kerr* v. *Clyde Ship. Co.*, 1839, 1 D. 901; *Robertson* v. *Anderson*, 1841, 3 D. 986; *London and Edin. Ship. Co.*, 1841, 3 D. 1045; *Fleming* v. *Ballantyne*, 1842, 5 D. 305; *Duke of Portland*, 1852, 15 D. 62. See also the Report of Mer. Law Com., 1855, pp. 96–104.

(*b*) See Lindley, p. 383 *et seq.*, and p. 718 *et seq.*

has often been disabled from prosecuting its just claims; for, as all the partners must appear as plaintiffs, the refusal of any of their number to allow his name to be used, or his subsequent withdrawal of it from the instance, grounds a plea in abatement, if the defendant choose to object (*a*); and in questions *inter socios*, unincorporated companies have been found incapable of either suing their members or being sued by them, on the *ratio*, that as all the partners must appear as plaintiffs or defendants, as the case may be, one at least of their number would in either case have to appear in both characters (*b*). It is true that in equity some relief was ultimately accorded, where, in a question with the public, the company had to sue or be sued; but the consequences of the principle referred to ultimately proved so mischievous and insurmountable, that this more than anything else led to the introduction of the Registration Acts (*c*).

Effect of recognising the *quasi* person in Scotland.

In Scotland, the recognition of the *quasi* person of unincorporated associations has prevented the occurrence of these ludicrous consequences, and this practical denial of justice. The mere circumstance, that some of the members of an unincorporated association do not concur in an action, or that they disclaim a defence maintained by the company, does not of itself terminate the one or invalidate the other, in the absence of fraud or collusion; and, as will be afterwards seen, actions between the company and its members are even more favourably situated than those between the company and strangers.

Scottish theory.

The theory, therefore, of the law of Scotland appears to be as follows:—An unincorporated association, not being a *proper* person, can only appear judicially where the units constituting its membership are before the Court; but inasmuch as it is a *quasi* person, that condition will generally be satisfied by equivalents. We shall afterwards point out the cases in which the principle, that all the partners must be present, is enforced even to the letter with all the rigour of the English common law, where this rigour is demanded by the substantial interests of justice. We shall meanwhile proceed to consider the ordinary modes in which unincorporated

(*a*) Lindley, p. 383 *et seq.*; Coll. 457 *et seq.*, 768 *et seq.*; Thring 9 *et seq.*

(*b*) Lindley, p. 718 *et seq.*; Coll. 566 *et seq.*, 768 and 771 *et seq.*; Thring 9 *et seq.*

(*c*) Last references.

mercantile associations sue and defend, and in which the law of Scotland, without losing sight of the fundamental distinction between corporate and unincorporate societies, avoids the embarrassments and injustice that have manifested themselves in English law.

Ordinary modes of suing and being sued.

The ordinary modes in which unincorporated mercantile associations sue and are sued in Scotland are twofold, and are available according to the circumstances of the company.

1. An unincorporated association may sue and be sued without appearance of all the members, where, in addition to the descriptive name, there are given the names of at least three partners. This may be termed appearance by the descriptive name, with joinder of partners.

2. A private partnership may sue and be sued without calling all the partners, if the company name comprise the names of persons only, as 'Carrick, Brown, and Company,' in opposition to such names as 'The Sea Insurance Company,' 'The Culcreuch Cotton Company,' which are termed descriptive. This mode of suing and being sued is generally known as that in the social name.

These two modes have, by long usage and well-proved utility, come to be regarded as the ordinary forms in which unincorporated associations having gain for their object sue and are sued; and it will be observed, that in both of them two elements are present, viz. the individuality of the members, and the aggregation which constitutes the *quasi* person. We shall now proceed to consider these two modes in detail.

APPEARANCE IN THE DESCRIPTIVE NAME, WITH JOINDER OF PARTNERS.

Origin of.

This method of suing and being sued, though easily deducible from the theory of Scottish law in relation to unincorporated associations, appears only to have received the sanction of the tribunals with difficulty, and by slow degrees. At first, it seems to have been recognised only where the company was called as defenders, though it was afterwards extended by parity of reasoning to cases where the company sued.

When company defends.

In 1757, it was held that the 'Arran Fishery Company,' being unincorporate, could not sue in its descriptive name; but an opinion was indicated, that an action might have been maintained in the names of the directors (*a*). Subsequently to this, numerous suits were raised at the instance of the 'York Buildings Company,' and that of an individual name as governor, without any objection having been taken to the instance. But in this case the company was really incorporated by Act of Parliament, though it might be doubted whether it was a corporation to the effect of holding land in Scotland (*b*). We then come to the case of the *Sea Insurance Company* v. *Gavin*, 1827 (no decisions of importance being reported in the interval), where the Court sustained an action against a company in its descriptive name, with joinder of the manager and three of the directors (*c*). But in this case, the four individuals named had signed the policy upon which proceedings were taken. In *Cabbell* v. *Brock*, 1828, the House of Lords expressed grave doubts whether a bank could sue in name of its officials (*d*); but in the immediately subsequent case of the *Commercial Bank*, that appellate tribunal, after making full inquiry into the practice, ultimately held, that in accordance with the existing law of Scotland, a company unincorporate might sue and be sued in its descriptive name, in conjunction with the names of several of the individual partners (*e*). To much the same effect was the decision in *Maclean* v. *Rose* (*f*), 1836.

When company sues.

Hitherto the number of partners necessary to be joined along with the descriptive name had remained doubtful, and no direct authority could be shown in favour of extending this mode of libelling to cases in which the company appeared as pursuer; but in the *London and Edinburgh Shipping Co.*, 1841 (*g*), while it was held that a mercantile company could not sue by a descriptive name with joinder of one person only as a manager or partner, an opinion was intimated that three partners in conjunction with the descriptive name would have been sufficient either for suing or being sued. After some intermediate cases which did not materially

(*a*) M. 14560.
(*b*) Opinion of Lord Alloway in *Sea Insurance Co.*, 1827, 5 S. 352.
(*c*) 5 S. 348.
(*d*) 3 W. and S. 75.
(*e*) 3 W. and S. 365. See also *Shotts Iron Co.* v. *Hopkirk*, 1828, 6 S. 399.
(*f*) 15 S. 236.
(*g*) 3 D. 1046.

affect the question, it was in 1848 held by the Lord Ordinary, and apparently acquiesced in by the Court, that a joint-stock company may sue under its descriptive name, with joinder of three or more of the individual members (*a*). From this period the practice has been constant and uniform to sue as well as be sued in this manner, and it may therefore now be held as fixed in the law of Scotland (*b*).

APPEARANCE IN THE SOCIAL NAME.

Origin of.

This mode of suing and being sued is of very old standing in the law of Scotland, and appears to have been adopted from the old French law, which, among other kinds of mercantile associations, recognised *La Société en nom collectif* (*c*). All through the last century perpetually recurring examples of suing and being sued in the social name are to be found in the decisions of Kames, Elchies, Falconer, and Kilkerran; and when such cases were brought under review of the House of Lords, no objection appears to have been taken to this mode of libelling. It was not till the close of the century, when the minds of Scottish lawyers began to be tinged with notions derived from English pleadings, that doubts came to be entertained of the competency of this mode of libelling a company. The question appears to have been first raised in the case of *Douglas, Heron, and Co.* v. *Gordon*, 1792, when it was objected that an action could not be sustained in the social name; but after a minute examination into the practice, the objection was ultimately repelled, both by the Court of Session and the House of Lords (*d*). After this the question was not again directly raised till 1832, though in the interval numerous cases occurred in which the Court incidentally referred to the practice of suing and being sued in the social name as fully established (*e*). In that year, in the case of *Aitchison and Co.* v. *Burnside's Trustees*, a doubt was thrown out by

(*a*) *National Exch. Co.* v. *Drew*, 11 D. 179. See also opinions of judges in *Lond. and Edin. Ship. Co.*, *supra*.

(*b*) See Mercantile Law Com., p. 96.

(*c*) See *Les Ordonnances de* 1673, 1681, and 1687, respectively, from which the *Code de Commerce* is chiefly a compilation.

(*d*) Referred to in Lord Medwyn's opinion in *Forsyth* v. *Hare*, 13 S. 50, 3 Paton's App. 428. This case is not reported in the Court of Session.

(*e*) *Thomson* v. *Liddell and Co.*, 1812, 16 F. C. 721; *Culcreuch Cotton Co.*, 1822, 2 S. 47; *Sea Insurance Co.*, 1827, 5 S. 375, opinion of Lord Justice-Clerk; *Robb* v. *Forrest*, 1830, 8 S. 839.

Lord Meadowbank as to the competency of the instance, because the social name included the name of no actually existing partner; and as the action was dismissed, the case has often been quoted as a decision against this mode of libelling. But, in truth, the decisions both of the Lord Ordinary and of the Inner House proceeded on the merits of the case, and were to the effect, that where a defender denies the existence of an alleged company in whose name he is sued, he is entitled to have the names of its alleged partners before the Court, so that it may appear whether or not the concern exists (*a*). That this was the real import of the judgment, is plain from the case of *Forsyth* v. *Hare and Co.*, which was decided in 1834 (*b*). Here Forsyth raised an action against a company of manufacturers in Bristol under their social name of John Hare and Co., without joinder of any of the individual partners. Jurisdiction had been founded by arrestment of the company funds in Scotland, laid on in the social name. The objection was taken, that 'the action was incompetent, in respect that it only concluded against John Hare and Co., and did not call or conclude against the individual partners of the company.' In consequence of what had taken place in the previous case of *Aitchison* v. *Burnside*, the Lord Ordinary reported the case to the Court, in order that the question might be authoritatively settled. Minutes of debate were ordered and laid before the whole judges, and it was held unanimously that this mode of suing and being sued was competent, and fully established in practice. The opinions returned in this case are very instructive, and contain a history of the origin and practical working of this mode of appearance in the law of Scotland. This decision was followed by that in *Wilson and Co.* v. *Ewing*, where it was held that a mercantile company may give a charge in name of the social firm by which they grant obligations, though the name of no individual partner be specified as charger (*c*); and it seems to be now fixed law, that a mercantile company may sue and be sued in the social name (*d*), meaning thereby the name in which it grants obligations, provided it be composed of the name or names

(*a*) 1832, 10 S. 296.

(*b*) 13 S. 42.

(*c*) 1836, 14 S. 262. See also *Thomson* v. *Johnstone*, 1836, 15 S. 173.

(*d*) *Thomson, Bonar, and Co.* v. *Johnstone*, 1836, 15 S. 173. See also *Knox* v. *Martin*, 1847, 10 D. 50; *Craig* v. *Brock and Ferguson*, 1841, 4 D. 54. Report of Merc. Law Com., 1855, p. 95.

of partners, even though these partners may have died or are for other reasons no longer in the firm (*a*).

When a company is called in this manner, it is a usual, though by no means a necessary practice, to call also some of the partners as individuals (*b*).

Individual trading *socio nomine.*

It may here be observed, that when an individual carries on business in name of a firm, he may both sue and be sued *socio nomine* for debts so contracted (*c*). The individual, and such as contract with him in this manner, are alike precluded from objecting *personali exceptione.*

APPEARANCE BY OFFICIALS.

This as a rule incompetent.

If, when unincorporated mercantile associations are to sue or be sued, the original and strictly correct method of inserting the names of all the members or partners in the writ be not adopted, the two modes we have just been considering appear to be the only alternatives that can be safely relied on as competent according to the existing law of Scotland. Attempts, it is true, have frequently been made to vindicate for such associations the privilege of suing and being sued in the names of their office-bearers, committee-men, directors, or managers, or of single officials specially designated for the purpose. But such attempts have been always discountenanced by the tribunals, as subversive of the distinction between corporations proper and mere common law companies.

It was accordingly held as early as 1761 (*d*), that tradesmen forming themselves into a society cannot sue by their box-master, inasmuch as they are not a corporation; and the same principle was given effect to in *Lawson* v. *Gordon*, 1810, 15 F. C. 741, where the office-bearers of a mason lodge attempted to sue in name of the lodge. The following decisions may also be referred to as confirmatory and illustrative of this rule: *Wilson* v. *Kippen*, 1823 (*e*), where the committee of a coffee-room were found not entitled to sue,

(*a*) *Forsyth* v. *Hare*, 1834, 13 S. 51; *Maclean* v. *Rose*, 1836, 15 S. 236.

(*b*) *Ibid.*; *per* Lord Deas in *Young* v. *Livingstone*, 1860, 22 D. 983.

(*c*) *Mills* v. *Hamilton*, 1830, 9 S. 111; *Booth* v. *Commercial Bank*, 1823, 2 S. 273; *Rose* v. *Moore*, 1833, 11 S. 344.

(*d*) *Crawford* v. *Mitchell*, M. 1958.

(*e*) 2 S. 335, as compared with previous case of same name, 1822, 1 S. 282.

because it did not plainly appear that they prosecuted as individuals; *Bow* v. *Patrons of Cowan's Hospital*, 1825, 4 S. 280, which brings out the distinction in this respect between a corporation and an ordinary association; *Scot* v. *Napier*, 1827, 5 S. 414; *Trotter* v. *Dores*, 1833, 12 S. 161; *Creighton* v. *Rankin*, 1838, 16 S. 447; *Way* v. *Kay*, 1828, 6 S. 914, a case of great hardship, in which it was held that a friendly society could not be sued through its office-bearers, because it had not been formed under the statutes which give such companies this privilege; *Kerr* v. *Clyde Shipping Company*, 1839, 1 D. 901; *Mitchell* v. *Morrison*, 1839, 1 D. 1115; *Robertson* v. *Anderson*, 1841, 3 D. 986; *London and Edinburgh Shipping Company* v. *M'Corkle*, 1841, 3 D. 1045,—cases in which it was held that unincorporated associations could not sue in the descriptive name with the addition of the names of their agents; *M'Millan* v. *M'Culloch*, 1842, 4 D. 492, where it was held that the partners, and not the manager or agent, should have been cited; *M'Neil* v. *Coltness Iron Company*, 1842, 1 Broun 454; *Fleming* v. *Ballantyne*, 1842, 5 D. 305, where a distillery company was found to have no title to raise action or diligence at the instance of J. B. in name of, and for behoof of, and as authorized by, the firm. This has always been held a leading case, fixing the law on the subject. See also *Thom* v. *North British Bank*, 1848, 10 D. 1254, for the opinion of the Lord Ordinary.

Exceptions explained by estoppel.

Notwithstanding of these decisions, it has sometimes been stated that mercantile joint-stock companies, though unincorporate, may sue and be sued in name of their directors or other officials (*a*). An attentive consideration of the decisions generally quoted in support of this doctrine, will, however, it is thought, lead to the conclusion that they are exceptional cases, to be explained on the principle of *estoppel* (*b*).

(*a*) 2 Bell's Com. 629; Shand's Practice i. 181.

(*b*) The use of this term has been objected to, as not properly one recognised in Scottish law. I am unable to appreciate the force of this objection. When a principle of Scotch law has come to be designated by a technical word of Scottish origin, it is certainly quite proper that that word should be exclusively employed; but when such a principle has not found expression in this manner, it seems very difficult to understand why an English word, which exactly expresses the idea, should not be employed without hesitation. Any rule to the contrary would, if rigidly enforced, reduce the legal vocabulary within very inconvenient limits. Now, the prin-

A party is said to be estopped or barred, when he has done or acquiesced in something being done which precludes him from insisting in a plea otherwise competent. Now, in all the instances where unincorporated associations have been allowed to sue or be sued in name of their officials, it should seem that the defenders have been estopped from pleading the common law, by reason of some contract, express or implied, to which they had been parties.

Doctrine of estoppel.

In *Wilson* v. *Kippen*, 1822, 1 S. 282, a committee of a private association was found entitled to charge certain of its members, because they had expressly agreed to its appointment for the purpose of recovering outstanding debts. In *Fisher* v. *Syme*, 1827, 6 S. 216, a charge at the instance of the cashier of a banking company was sustained, because the suspenders had bound themselves to make payment to him *nominatim*. In *Carruthers* v. *Johnstone*, 1828, 7 S. 38, the manager of a banking company was found entitled to reclaim, because the respondent had called the action against the company in the manager's name. In *Cheyne* v. *Little*, 1828, 7 S. 110, action was sustained at the instance of the cashier against a partner of the Fife Bank, because the defender had agreed to be sued in this manner, inasmuch as the original contract provided that this mode was competent, and a return had been made to the Stamp Office in order to obtain the statutory privilege to that effect, and the defender had been a party to both of these transactions. In *Leslie* v. *Sproat*, 1829, 7 S. 312, a purchaser of a lease from a mason lodge was found not entitled to resist payment of a bill to the treasurer, in respect he had granted it in favour of that officer. In *Downe* v. *Pitcairne*, 1829, 3 W. and S. 472, the House of Lords sustained the title of the office-bearers of an unincorporated association to sue, in respect that the contract on which the action proceeded had been specially made

Examples of, when company was pursuer;

ciple denoted by the word '*estoppel*' is fully recognised and daily given effect to in Scotch practice, as it must be in every legal system deserving the name. The reason of its not having found expression in a word exclusively Scotch, is simply that from the numerous changes in our forms of process and other causes, the art of pleading has not with us attained the same scientific precision as elsewhere. Yet the word '*estoppel*' is often made use of in oral debate; and it is evident that if we reject it in a legal treatise, we must be prepared either to resort to the continual use of inconvenient *periphrases*, or to adopt some such word as '*barrel*,' for which I know of no authority.

with them, and the action itself was in fact a defence against another action raised by the defenders against the association, in which they had chosen to call it by its office-bearers. There was thus estoppel both by contract and conduct. In *Somervail* v. *Edinburgh Bible Society*, 1830, 8 S. 370, religious associations were found entitled to sue in name of their treasurer or secretary for recovery of certain legacies, the donor having bequeathed the legacies to these associations in their descriptive names, and declared the discharge of their officials to be sufficient, and the defenders being the representatives of the donor (*a*). In *Gemmel* v. *Barclay*, 1830, 9 S. 33, the committee of an unincorporated society was found entitled to sue two of its members, because the committee was of their own appointment, and they had already paid instalments to account of the sum concluded for to the committee. The case of *Kerr* v. *Wood*, 1830, 8 S. 628, may also be referred to as illustrative of the principle here under consideration; and it will be found well brought out in *Gillies* v. *Hunter*, 1831, 9 S. 257, where it was expressly laid down, that when the office-bearers of a society unincorporated have, by the articles thereof, power to sue, they must set forth this fact in the libel, coupled with the other fact that the defender had become a party to such articles (*a*).

and when company was defender.

The same doctrine of estoppel will be found to explain cases in which the company was defender. In *Ross* v. *Lauder*, 1831, 9 S. 275, the committee and congregation of a religious association were held barred from pleading the common law, in respect that they had granted the bill on which the proceedings took place, *eo nomine*. In the *Sea Insurance Co.* v. *Gavin*, 1827, 5 S. 348, a libel and charge was sustained against the manager and certain individual directors as representing an unincorporated association, in respect the policy of insurance had been subscribed by the defenders. In *Wood* v. *M'Caul*, 1833, 12 S. 50, a member of an unincorporated association was found barred from objecting to the title of the *preses* and treasurer to sue him, in respect that he had at a former stage of the case passed from this objection on receiving a payment of expenses. In *Richmond* v. *Grahame*, 1847, 9 D. 633, it was held that a committee of management of a body of shareholders could be sued for performance of an obligation, without calling the other

(*a*) See also *Reid* v. *Moir*, 1833, 11 S. 605.

shareholders, in respect that they had bound themselves jointly and severally for its performance. See also *Ramsay* v. *Smail*, etc., 1840, 2 D. 1336. In *Sturrock* v. *Thoms*, 1851, 13 D. 762, the treasurer of a joint-stock company, with consent of the committee of management, was found entitled to sue a shareholder who refused payment of a call, because that mode of suing had been provided by the articles of association, and the shareholder had become a party to them (*a*).

Cases of banking companies.

There is, indeed, a class of cases, viz. that of unincorporated banking companies, which may be instanced as somewhat militating against the proposition that unincorporated associations having gain for their object cannot, except in virtue of the principle of estoppel, sue or be sued in the name of officials; but it is thought that, when properly examined into, such cases will not be found to bear such a construction. It may be at once conceded, that opinions seemingly favourable to a privilege of this kind, have occasionally been hazarded from the bench, and that instances are not wanting in which it was apparently exercised. It is even probable, that if such instances had been sufficiently numerous and long continued, they might ultimately have obtained the force of consuetudinary law, thus adding another to the recognised modes by which in Scotland unincorporated associations may appear judicially. But it must be observed, that the instances in question were either cases where no objection was stated, or where, if repelled, the principle of estoppel can be plainly traced in operation. Indeed, no case can be instanced in which the competency of this mode of procedure was made the *ratio decidendi;* and in the later cases the contrary was expressly laid down. So that it seems very plain, that while prior to 1825 the practice in question was perhaps coming into use, it was checked before it had obtained a permanent standing in the common law.

In the *Commercial Bank* v. *Pollock*, 1828, 3 W. and S. 365, the action was brought not in name of the cashier, but in that of the bank and more than three of the partners; and *Cabbell* v. *Brock*, 1828, 3 W. and S. 75, is an instance of estoppel. Both actions

(*a*) It need hardly be observed, that a company may always authorize an individual or a committee of individuals to sue or defend for its interest; but in such cases, the instance must run in the company name, not in that of the persons entitled to act on its behalf.

were ultimately sustained; but the doubt originally expressed by the House of Lords, at the first hearing in 1825, was not whether a banking company unincorporate could sue or be sued by its cashier, but whether an unincorporated association could do so in its descriptive name and those of certain of the individual partners. In consequence of this doubt, the Act 6 Geo. IV. c. 131 was passed, to enable joint-stock companies with transferable shares to sue and be sued in name of their managers or principal officers, on condition of their complying with certain provisions. The Act was limited to twelve months, and was allowed to expire. But in the following year (1826), a permanent statute, 7 Geo. IV. c. 67, was enacted containing similar provisions, but limiting their application to banking companies. Almost all unincorporated banking companies have since availed themselves of this statutory privilege.

They do not possess the privilege at common law.

Now the mere fact of an Act having been passed to confer this privilege, affords strong presumptive evidence that it did not previously exist at common law; and, accordingly, no case can be found where a banking company was allowed to sue or be sued by its manager or officials on the ground of privilege or right. In *Low* v. *Bell*, 1827, 2 W. and S. 579, and *Low* v. *Duncan*, 2 W. and S. 583, though the title of the cashier to sue was sustained, the defenders had barred themselves from insisting in the defence of want of title, by having transacted directly with the pursuer. The case of *Clarke* v. *Wilson*, 1830, 8 S. 1025, though quoted in support of this supposed privilege, has in reality no application. In *Cheyne* v. *Little*, 1828, 7 S. 110, and *Drummond* v. *Holliday*, 1831, 9 S. 284, the title of the bank official was sustained both in respect of 7 Geo. IV. c. 67, and of estoppel on the part of the defenders; and in any subsequent cases, where an unincorporated banking company has been allowed to sue or be sued in name of its manager or cashier, the defence of want of title has been repelled, either in virtue of the statute or on the ground of estoppel, sometimes on both combined (*a*).

In the case of *Scott* v. *Napier*, 1827, 5 S. 393, it was held by

(*a*) *Carruthers* v. *Johnston*, 1828, 7 S. 38; *Thoms* v. *North British Bank*, 1848, 10 D. 1254; *National Ex. Co.* v. *Drew*, 1848, 11 D. 179; *Glasgow and Monklands Ra. Co.* v. *Tennent*, 1848, 11 D. 212; *North British Bank* v. *Allan*, 1850, 12 D. 966.

the majority of the judges, that an unincorporated banking company could not at common law be sued in name of its manager or other officer; and in *Thoms* v. *North British Bank*, 1848, 10 D. 1254, the Lord Ordinary held, that at common law such associations could not sue in this manner, even in a question *inter socios*. It was subsequently held, in *The North British Bank* v. *Allan*, 1850, 12 D. 966, that the right of such associations to sue and be sued at common law was not taken away by the 7 Geo. IV. c. 67; but this right was construed to mean that of suing and being sued in the descriptive name, with joinder of at least three partners. It would thus appear that unincorporated banking companies are in this respect in the same position with other voluntary associations, wherever they are not privileged by some statutory enactment.

Existing statutory provisions.

Questions of this kind are not now likely to occur; for every joint-stock banking company is, in terms of 7 Geo. IV. c. 67, bound to make an annual entry at the Stamp Office, Edinburgh, of the name of the society or company, and of every partner, and of the name and abode of the manager or other officer in whose name the society is to sue and be sued, under a penalty of £500 for each week it carries on business without making such entry. Moreover, since the passing of the Companies Act, 1862, no company or partnership consisting of more than ten persons can be formed for carrying on the business of banking, unless it is registered as a company under that Act, or is formed in pursuance of some other Act of Parliament, or of letters patent (including, of course, royal charter) (*a*). Companies so formed sue and are sued in their descriptive name like proper corporations (*b*).

It may be observed, that when companies sue or are sued by

(*a*) The Companies Act, 1862, s. 4.

(*b*) 'Friendly societies' were, in virtue of various Acts of Parliament, empowered to sue and be sued in the names of their treasurers, or of trustees in whom their effects are vested. But where the statutory regulations have not been complied with, they are held to be in the same position as other unincorporated associations.—*Way* v. *Kay, etc.*, 1828, 6 S. 914.

The whole of these Acts, which were very numerous, were repealed by the consolidating Act of 1855, 18 and 19 Vict. c. 63, the 19th section of which provides that the trustees of such societies may sue and be sued in their own names as trustees for the society. See Amendment Acts, 21 and 22 Vict. c. 101; 23 and 24 Vict. c. 58. Industrial and provident societies formed under the 25 and 26 Vict. c. 87 (1862) are corporations, and sue and are sued as such.

their managing official, in terms of 7 Geo. IV. c. 67, it is not necessary to libel the Act, as it is a public statute (*a*).

Concluding observations.

Upon the whole, then, it would appear that, according to the law of Scotland, unincorporated associations, established for the purposes of gain, can sue and be sued in one of three ways only: 1*st*, In the name of all the partners; 2*d*, in the social name (when they happen to possess such) by which they sign obligations; and 3*d*, in their descriptive name, with joinder of at least three partners. The only exceptions to this rule appear to be, (1) where they are privileged by some enabling statute, and (2) where the principle of estoppel precludes the opposite party from pleading the common law.

Practical rule.

From motives of equity, and a desire to do substantial justice, the tribunals have, it would seem, often given effect to the principle of estoppel; but it must be borne in mind by the practitioner, that it is by no means easy to ascertain beforehand in what cases this principle may be relied on as a means of avoiding the requirements of the common law; and it is therefore the most safe and prudent course to proceed in one or other of the recognised modes of suing or being sued, and thus avoid unnecessary litigation, delay, and expense.

APPEARANCE IN NAME OF ALL THE PARTNERS OR MEMBERS.

Cases where this is necessary.

It has already been stated, that there are cases where neither of the two compendious modes of suing and being sued, generally available in unincorporated associations, can be adopted; but where, as in England, the whole partners must be called as pursuers or defenders. The most common instance of this is where the company has been dissolved, and an illiquid company debt is sought to be enforced against persons who were formerly its partners. The general rule in such circumstances is, that the action must be directed against all the surviving partners, and against the representatives of those who are deceased (*b*).

(*a*) *Glasgow, Airdrie, and Monk. Ra. Co.* v. *Tennent*, 1848, 11 D. 212.

(*b*) *M'Tavish* v. *Saltoun*, 1821, 20 F. C. 263; *Geddes* v. *Hopkirk*, 1827, 5 S. 697, and 6 S. 193; *Dewar* v. *Munnoch*, 1831, 9 S. 487. See *Noble* v. *Wood*, 1830, 8 S. 365; *Bell* v. *Willison*, 1822, 1 S. App. 220; where a firm had been dissolved and reconstructed with the same partners.

Reason of the rule.

The reason of this will be found in the principle which (as already explained) has given rise to the two compendious modes of suing and being sued. The law of Scotland sees in an unincorporated association, both the *quasi* person of the society, and the persons of the individuals composing it. Now on dissolution the *quasi* person is lost, and nothing remains but the individual members, who, as *correi debendi*, must all be brought into the field. Independently of this technical reason, the rule is based on considerations of substantial justice; for, as was observed by the Lord Justice-Clerk (Inglis) in the late case of *Muir* v. *Collett* (*a*), 'when there are *correi debendi*, and one of them only is called into the field by the common creditor, he is manifestly put to a great disadvantage; for the obligants, whom the pursuer does not choose to call, may very possibly have a good defence against the whole demand, or may be in possession of a discharge of the whole debt.'

Equitable exceptions.

Yet this equitable rule will not be interpreted in such a way as to afford cover for fraud or to stay the course of justice. Thus the surviving partner of a company was held barred from pleading that the representatives of a deceased partner had not been called, by his declinature to state who or where they were (*b*). And the Court will not insist on calling such *quondam* partners as are not resident within the kingdom (*c*).

Mode of libelling.

When it has been found necessary to call the company in this manner, care must be taken to libel the action not only against the individual partners, but also against the *quasi* person of the company itself (*d*). This is done either by calling first the company in its descriptive or other name, and then adding the names of the individual partners; or else by calling the individual members *nominatim*, and afterwards stating that they are called as the partners of the company, giving its descriptive or other name.

Presumptions in law.

When an unincorporated company sues in either of the two ordinary modes, the law presumes that all the members concur in

(*a*) 1862, 24 D. 1122.

(*b*) *M'Braire* v. *Hamiltons*, 1826, 2 W. and S. 66; *Gibson* v. *Smith*, 1849, 11 D. 1024; *Binnie* v. *Machray*, 1848, 10 D. 1508. The same equitable principle has been given effect to in England. See Lindley, p. 408.

(*c*) *Muir* v. *Collett*, 1862, 24 D. 1119. See also *Price* v. *Logan*, 1862, 24 D. 491.

(*d*) *M'Tavish* v. *Lady Saltoun*, 1821, 20 F. C. 263; *Reid* v. *Douglas*, 1814, 17 F. C. 643.

the action, or at least that it is raised with the approval of what we have before seen constitutes the will of the company. If, therefore, there be reason to believe that this presumption is not in accordance with the fact, and that a portion of the membership is making use of the company name to maintain an action, without the concurrence or against the will of the company, process will be sisted until all the others sist themselves as parties, or until the objection founded on their non-concurrence has been removed (*a*).

Practice.

To obviate questions of this kind, it has not been unusual in our later practice to raise actions in the name of the company and its whole partners; and the practice has much to recommend it (*b*). In general it is desirable, before raising an action in the company name, to call a meeting of all the partners, and obtain their authority for the contemplated procedure. When this has been done, it is no objection that a minority do not concur, unless very good grounds can be given for their refusal (*c*).

Procedure after dissolution.

After a company has been dissolved, the *quondam* partners may agree among themselves to appoint one or more persons, by the intervention of whom they may sue and be sued, to the effect of winding up the concern. In such a case the *quondam* partners no longer stand in the relation of *socii* to each other, but continue liable in certain joint obligations, and entitled to exercise certain rights in virtue of the former existence of the partnership relation which is now dissolved. They are therefore entitled to use the privilege which the common law concedes to them as individuals, to nominate a commissioner or commissioners to sue for and defend their common interests (*d*).

Somerville v. *Rowbotham.*

In a late case, it seems to have been held that a mutual insurance association, neither incorporate nor entitled to the benefits of the Friendly Society Acts, is not to be regarded as a trading association, and therefore 'not in law a separate legal person in the same way as a mercantile or trading company.' It was therefore assumed, that when such an association was sued, the plea could not be taken that it was not called by its separate person as

(*a*) *May* v. *Matthews*, 1834, 13 S. 94; *Shotts Iron Co.* v. *Hopkirk*, 1828, 6 S. 399; *Aitchison and Co.* v. *Burnside's Trs.*, 1832, 10 S. 296; *Sclater* v. *Clyne*, 1831, 9 S. 248.

(*b*) See Shand's Prac. p. 184.

(*c*) *Shotts Iron Co.*, *supra*; *Wilson* v. *Kippen*, 1822, 1 S. 282.

(*d*) *Jameson* v. *Watson*, 1852, 14 D. 1021.

well as in the names of individual members; and it was laid down that the proper mode of suing such an association was to call all the members; and that when, from their number or fluctuating character, this was impossible, some modification of the rule was required to prevent a denial of justice. In the very special circumstances of the case, the action was allowed to proceed upon its being directed against all the members of the committee of management, sixteen in number, as representatives of the association (*a*).

Amendment of libel.

When some of the partners who ought to have been called as pursuers or defenders have been omitted, the mistake may generally be rectified by an amendment, or at all events by a supplementary summons (*b*); but not when the instance is radically defective (*c*). When the sole surviving partner of a company raised action in his own name for what turned out to be a company debt, decree in his favour was granted, on a disclaimer of all interest by the heir of the deceased partner being produced (*d*).

Res judicata against latent partner.

As a general rule, decree obtained against a company is *res judicata* against a latent partner; it would seem, however, that in special cases of an equitable kind this rule will not be rigidly enforced (*e*).

(*a*) *Somerville* v. *Rowbotham*, 1862, 24 D. 1187.

(*b*) *Thomson* v. *Gilkison*, 1830, 9 S. 27; *Johnston* v. *Duncan*, 1824, 2 S. 532, but see 9 S. 520; *Inglis* v. *Lane*, 1831, 9 S. 599.

(*c*) *Craig* v. *Fleming*, 1838, 16 S. 488.

(*d*) *M'Leod* v. *Langmuir*, 1824, 3 S. 270.

(*e*) *Edin. and Leith Ship. Co.* v. *Gillon*, 1832, 10 S. 404.

CHAPTER IV.

HOW CORPORATIONS SUE AND ARE SUED.

Common law. PROPER corporations sue and are sued in the corporate name conferred upon them by their special act, charter, or registered memorandum of association. It is not necessary, nor indeed proper, that there should be any joinder of the names of members or officials, unless this is specially required by the instrument of incorporation (*a*). The possession of a corporate name is one of the *naturalia* of a proper corporation; and the general rule of law is, that without dissolution and reconstruction no alteration can be made upon the name which the company received when it was brought into existence as a corporation.

Act 1863. It is, however, enacted by the Companies Clauses Act, 1863, 26 and 27 Vict. c. 118, part iv., that where, by any special act subsequently passed and incorporating that part of the Act, the name of any company previously or subsequently incorporated is changed, such change shall be valid and effectual to all intents and purposes, and shall not abate actions then pending, or affect deeds or contracts previously made. Companies incorporated under the Act 1862. Act of 1862, are by sec. 13 of that Act entitled, with the sanction of a special resolution and the approval of the Board of Trade, to change their names, the registrar entering the new name and issuing a certificate of incorporation altered accordingly.

Act 1845. In the case of companies formed under the Company Clauses Consolidation (Scotland) Act, 1845, judicial writs, such as sum-

(*a*) *Whitehaven and Furness Ra. Co.*, 1848, 10 D. 1127. See Ersk. i. 7, 64; Bankt. i. 2, 27; *Fisher* v. *Hepburn and Syme*, 1827, 6 S. 216, as compared with *Bow* v. *Patrons of Cowan's Hospital*, 1825, 4 S. 280. See *Trinity House* v. *Magistrates of Edinburgh*, 1829, 7 S. 374.

monses, demands, or notices, requiring authentication, must be under the common seal of the corporation, or else must be signed by two of its directors, or by its treasurer or secretary (sec. 141).

Act 1862.

Companies incorporated under the Companies Act, 1862, sue and are sued in the name contained in the first article of their registered Memorandums of Association (secs. 8, 9, 10, 11, 12, and 13, compared with sec. 18); and any summons, notice, order, or proceeding, requiring authentication by the company, must be either under the common seal, or else signed by a director, secretary, or other authorized officer of the company (sec. 64).

In the case of unregistered companies brought under the operation of the Act 1862 for the purpose of winding up, if the company has no power to sue or be sued in a common name, the official liquidator or liquidators may, in his or their official name or names, or in such name or names as the Court making order for the winding up may direct, bring or defend any actions, suits, or other legal proceedings relating to the property vested in him or them as liquidators, or any actions, suits, or other legal proceedings necessary to be brought or defended for the purpose of winding up the company and recovering the property thereof (sec. 203).

Letters Patent Acts.

Companies formed under the Letters Patent Acts are not proper corporations, though they may be possessed of some of the privileges peculiar to such associations. They cannot therefore sue or be sued in a corporate name, but appear judicially in the names of two or more officers specially appointed in their contracts of association for this purpose (7 Gul. IV. and 1 Vict. c. 73, ss. 2 and 5).

FOREIGN COMPANIES.

General rules regarding.

It appears to be a settled principle of international law, that associations duly incorporated or formed into societies for trading purposes according to the laws of the country to which they belong, may validly make contracts in other countries, and may sue or be sued in any country within the jurisdiction of whose courts they happen to come (*a*). Whether they are so formed or incorporated

(*a*) See, as to this, Story's Conflict of Laws, s. 565; *Bank of Augusta* v. *Earle*, 13 Pet. 519, 13 Curt. 277, 2 Kent's Com. 284 seq.; *Dutch West India Co.* v. *Moses*, 1 Stra. 611; *South Carolina Bank* v. *Case*, 8

in their own countries is a question of fact, the *onus* of proving which lies on the pursuer (*a*). It must be observed, however, that the tribunals will not take notice of a foreign government not recognised by the government of the country from which they derive their jurisdiction (*b*).

International conventions.

To avoid the embarrassments that often arise when it is necessary for companies to sue or be sued before foreign tribunals, conventions are sometimes entered into between friendly states. The most important of these, in so far as this country is concerned, is that entered into between her present Majesty and the Emperor of the French. It was signed at Paris, April 30, 1862; and ratifications were exchanged at that capital, May 15, in the same year. It provides that all companies, and other associations, commercial, industrial, or financial, constituted and authorized in conformity with the laws in force in Great Britain or France, shall have the power of exercising all their rights, and of appearing before the tribunals, whether for the purpose of bringing action or for defending the same, throughout the dominions and possessions of either power, subject to the sole condition of conforming to the laws of such dominions and possessions. And it declares that these provisions are equally applicable to companies formed before as to those formed after its date. A similar convention exists between Great Britain and Belgium, also signed and ratified the same year (*c*).

B. and C. 427; *Sudlow* v. *Dutch Rhenish Ra. Co.*, 21 Beav. 43; *Chanter and Co.* v. *Borthwick*, 1848, 10 D. 1544; *Maclaren* v. *Stainton*, 16 Beav. 279, 5 H. of L. Ca. 416; *Edinburgh and Glasgow Bank* v. *Ewan*, 1852, 14 D. 547; *Lewis* v. *Baldwin*, 11 Beav. 153; *Ritchie and MacCormick* v. *Fraser*, 1852, 15 D. 205; *Mackenzie* v. *Sligo and Shannon Ra. Co.*, 9 C. B. 250; *Welland Ra. Co.* v. *Blake*, 6 H. and N. 410; *Lindsay* v. *London and N.-W. Ra. Co.*, 1855, 18 D. 62, 1858, 3 Macq. 99; *Hamilton* v. *Dutch East India Co.*, 1731, M. 4548, (1732) 1 Pat. App. 69.

(*a*) *Dutch East India Co.* v. *Van Mayers*, Str. 612; *Bank of St Charles* v. *De Bernales*, 1 Car. and Pa. 569; *Henriques* v. *Dutch West India Co.*, 2 Lord Raymond 1532.

(*b*) *City of Berne* v. *Bank of England*, 9 Ves. 347.

(*c*) *London Gazette*, 9 Dec. 1862, pp. 62–66.

CHAPTER V.

JURISDICTION.

General rules.

In all questions affecting private partnerships, companies, or corporations, the general rule is, that the ordinary tribunals have jurisdiction in the same way as in the case of individuals. To this rule, however, some exceptions have been introduced by the force of statute; and even when the ordinary principles of law apply, their operation sometimes presents peculiarities consequent on the person or *quasi* person of the association being not an individual, but an aggregation of individuals.

Domicile.

Companies, like individuals, are subject to the jurisdiction of the Supreme Court of Scotland, in whatever part of the country their places of business may be situated; but they are also subject to the ordinary provincial or local tribunals having jurisdiction in the particular localities where their principal place of business is situated; and it would seem that if they have several places of business situated in different localities, they are, like individuals having more domiciles than one, liable to the respective jurisdictions of all (*a*). It has been expressly decided, that the domicile of a railway company is not confined to the *locus* of the principal office, but exists wherever the company have stations for traffic (*b*).

Act 1862.

When an unregistered company is registered under the Act of 1862 for the purpose of being wound up, in order to determine what court has jurisdiction for this purpose, regard must be had to the part of the United Kingdom in which its principal place of business is situated. If it has a principal place of business in more

(*a*) *Spottiswood* v. *Morrison*, 1701, M. 4790; *Young* v. *Livingston*, 1860, 22 D. 983.

(*b*) *Aberdeen Ra. Co.* v. *Ferrier*, 1854, 16 D. 422; *Stewart* v. *Scottish Midland Ra. Co.*, 1852, 14 D. 594.

than one part of the kingdom, proceedings may be taken in any of the Supreme Courts within whose jurisdiction such offices are situated (*a*).

Constitution of jurisdiction against foreign companies.

Jurisdiction may be created against companies, whether corporate or unincorporate, by arrestment *jurisdictionis fundandæ causa*. The arrestment may be laid on any moveables or personalty forming part of the company property (*b*), or on any debts resting owing directly to the company. And this also applies to profits of joint-stock due the concern by another company. The debts or property must, however, be those of the company, so that it would not be sufficient to arrest what formed the separate estate of the partners, even though, as in unincorporated associations, that might ultimately be found liable for the company obligations (*c*). The jurisdiction so founded is good both for petitions and declaratory conclusions; but it is still a question whether it extends beyond the value of the goods arrested, though an opinion to that effect has been given (*d*). Arrestment of the share of a foreign partner in the funds of a Scotch company was held to create jurisdiction against him, though he alleged and offered to prove that he had no claim on the company funds (*e*). The decision, however, proceeded on specialties, and would perhaps deserve reconsideration. Arrestment of a ship will found jurisdiction against any of the registered co-owners (*f*).

What supersedes the use of arrestment.

If a debt or claim has been already constituted or otherwise rendered liquid against a foreign company, as by bill or docqueted account, any one of the partners coming under the jurisdiction of the Scottish courts may be proceeded against for payment (*g*).

(*a*) 25 and 26 Vict. c. 89, s. 199.

(*b*) *Lindsay* v. *London and N.-W. Ra. Co.*, 1855, 18 D. 62, aff. 1858, 20 D. (H. of L.) 4, 30 Jur. 336, 3 Macq. 99; *Parken* v. *Royal Ex. Co.*, 1846, 8 D. 365; *Gray and Illidge* v. *Pohill*, 1847, 9 D. 1146. This was an arrestment of deposits on shares. See *Anderson and Child* v. *Wood*, 1809, Hume 258; *Hamilton* v. *Dutch East India Co.*, 1731, M. 4548, 1 Pat. App. 69.

(*c*) See *Duffus and Others* v. *Mackay and Others*, 1857, 19 D. 430; *Galloway* v. *Liddell and Reid*, 1815, 18 F. C. 202.

(*d*) *Lindsay* v. *London and N.-W. Ra. Co.*, *supra*, and 1860, 22 D. 571.

(*e*) *Douglas* v. *Jones*, 1831, 9 S. 856.

(*f*) *Gibson* v. *Smith*, 1849, 11 D. 1024.

(*g*) *M'Tavish* v. *Saltoun*, 1821, 21 F. C. 263; *Fyffe* v. *Fergusson*, 1838, 16 S. 1038, aff. 1841, 2 Rob. App. 267; *Thomson* v. *Liddell and Co.*, 1812, 16 F. C. 721; *Galloway* v. *Liddell*, 1815, 18 F. C. 202. See *Ritchie and M'Cormick* v. *Fraser*, 1852, 15 D. 205.

Unless the concern has been dissolved, the partner of a foreign company cannot in general be proceeded against in this country when the debt has not been already constituted against the company (*a*). The right of retention, so far as it goes, will in some cases found jurisdiction against a foreign company (*b*), and no arrestment *ad fund. juris.* is necessary when reconvention applies (*c*). A multiplepoinding also supersedes the necessity of such an arrestment (*d*). In all such cases the debtor is already subject to the jurisdiction, by reason of his property being theoretically *in manibus curiæ*. Foreign companies entering into contracts by means of agents in Scotland, render themselves liable through their agents to the jurisdiction of the Scottish courts in all matters relating to such contracts (*e*); and an agent ordering furnishings for a foreign company renders himself personally liable for the price (*f*). Foreign companies having branch establishments in this country are capable of being sued in the Scottish courts (*g*). A Scotch company carrying on its manufactures in Scotland, but having offices and personal property in England, where it is represented by agents or managers, may be sued in the English courts (*h*).

Jurisdiction *ratione contractus.*

As a general rule it may be laid down, that contracts having for their subject-matter real property situated in one country cannot be sued on before the courts of another. The only exception would seem to be, where the contract creates a personal obligation which, though it has a connection with real property, may be fulfilled in the country where the contracting parties happen to be (*i*). Contracts relating to personal rights having, properly speaking, no locality, may generally be sued on before any competent tribunal under whose jurisdiction the parties happen to come (*k*).

(*a*) *Reid and Maccall* v. *Douglas*, 1814, 17 F. C. 643.

(*b*) *Arnott* v. *Stewart*, 1843, 5 D. 715.

(*c*) *Black and Knox* v. *Ellis and Sons*, 1805, 13 F. C. 473. M. App. *v.* Foreign, 7.

(*d*) *Miller* v. *Ure*, 1838, 16 S. 1204.

(*e*) *St Patrick Assurance Co.* v. *Brebner*, 1829, 8 S. 51; *Mills* v. *Albion Insur. Co.*, 1826, 4 S. 575, 3 W. and S. 233.

(*f*) *Burgess* v. *Buck and Co.*, 1829, 7 S. 824; *Millar* v. *Mitchell*, 1860, 22 D. 833. 1 Bell's Com. 494.

(*g*) *Bishop* v. *Mersey and Clyde Co.*, 1830, 8 S. 558. See *Wemyss* v. *Austral. Co. of Edinr.*, 1856, 19 D. 122.

(*h*) *Carron Co.* v. *Maclaren*, 16 Beav. 279, 5 H. of L. Ca. 449.

(*i*) *Findlater* v. *Dunmore and Co.*, 1809, 16 F. C. 129; *Norris* v. *Chambres*, 29 Beav. 246, aff. 7 E. Jur. N. S. 689; *Hunter* v. *Stewart*, 31 Law Jour. (Ch.) 346.

(*k*) 2 Kent's Com. 285, note.

Contracts relating to personalty.

The validity and construction of the contract fall in general to be determined according to the law of the country where it is entered into; but where it is expressly or tacitly agreed to be implemented in some other place, it will be interpreted according to the law of the place of performance (*a*). Sales of goods or personal chattels, which are valid according to the *lex loci contractus*, will be held binding in this country (*b*). It is not to be denied, however, that much obscurity hangs over this branch of international law, and that much difficulty will often be found in applying the rules above enunciated. Mr Burge sums up the matter thus: 'It may be stated generally, that with respect to contracts of which moveable property is the subject, the law of the place in which the contract is made will in some respects exclusively prevail, although the contract is to be performed in another; and that in those respects in which it does not prevail, the law of the place where the contract is to be performed must be adopted. But this conclusion is subject to some qualifications and exceptions' (*c*). The tribunals of this country will not give effect to contracts repugnant to the fundamental principles of their own law, or contrary to religion or morality (*d*).

Sisting of process because of foreign proceedings.

When an action is raised between two parties, one a foreigner, but both plainly under the jurisdiction of the Scottish courts, the action will not necessarily be sisted on the ground that proceedings are about to be taken in a foreign court where the question may be more conveniently tried (*e*). The English courts in similar circumstances refused to stay an action raised against a foreigner, on the ground that the plaintiff had already taken proceedings against the foreigner in his own country in relation to the same matter, and that these were then in dependence (*f*). Where, however, the Court are of opinion that it is for the ends of justice to do so, they will sist procedure till the issue of the foreign litigation (*g*). In an

(*a*) Story, Conflict of Laws, ss. 280, 281, 308–314; 2 Kent's Com., pp. 393, 394; Chitty on Contracts, pp. 88–91. *Robinson* v. *Bland*, 2 Bur. R. 1077; *Royal Bank of Scotland* v. *Scott, Smith, and Co.*, 1813, 17 F. C. 90; *Rickman* v. *Parry and Maclachlan*, 1827, 5 S. 653; 2 Bell's Com. 690.

(*b*) *Cammell* v. *Sewell*, 5 H. and N. 728.

(*c*) 3 Burge's Com. on Col. and For. Law, p. 778.

(*d*) *Fenton* v. *Livingstone*, 1859, 3 Macq. 497, reversing 18 D. 865.

(*e*) *Carron Co.* v. *Stainton*, 1857, 19 D. 318.

(*f*) *Cox* v. *Mitchell*, 7 C. B. N. S. 55.

(*g*) *Cochrane* v. *Paul*, 1857, 20 D. 178.

action by a Scotch party against persons in Scotland as partners of an English company whose affairs had, under the Winding-up Acts, been placed under the administration of a Master in Chancery, it was held that the action must be sisted till the pursuer's claim was disposed of by the Master (*a*). The Lords Justices of England having refused to direct transfers by a *curator bonis* of shares of an English company belonging to their ward, in respect there was no suggestion from the Scotch courts as to realizing the shares, the Court of Session authorized the curator to sell the shares, and invest the proceeds on Scotch heritable security (*b*). See, as to conflict of jurisdiction, the cases noted below (*c*).

Res judicata by a foreign tribunal will generally form a bar to an action brought in this country for opening up a judgment between the same parties, and relating to the same cause of action; but it must be shown that the foreign judgment is final and conclusive according to the law of the foreign jurisdiction (*d*). *Res judicata.*

STATUTORY TRIBUNALS (*e*).

When special privileges and aggressive powers have been conferred on a company by Act of Parliament, it has been usual to create or designate special tribunals for regulating the exercise of these powers and privileges, and for assessing compensation to such persons as have had their lands taken or their common law rights interfered with by the operation of those exceptional pieces of legislation. Several provisions of this kind are to be found in the Companies Clauses and the Railway Clauses Consolidation Acts, as well as in many special acts obtained before these general statutes had been passed. Such provisions have often given rise Nature and extent of their jurisdiction.

(*a*) *Edin. and Glas. Bank* v. *Ewan*, 1852, 14 D. 547.

(*b*) *Mathieson*, 1857, 19 D. 917.

(*c*) *M'Cubbin* v. *Venning*, 1859, 22 D. 164; *Carron Co.* v. *Stainton*, 1857, 19 D. 318.

(*d*) *Wilson* v. *Brunton*, 1758, 2 Pat. App. 11, reversing M. 4549; *Whitehead* v. *Thompson*, 1861, 23 D. 772; *Chanter* v. *Borthwick*, 1848, 10 D. 1544; *Boe* v. *Anderson*, 1857, 20 D. 11; *Hamilton* v. *Dutch East Ind. Co.*, 1731, M. 4548, 1 Pat. App. 69; *Frayes* v. *Worms*, 10 C. B. N. S. 149. See Chitty on Contracts 703-705. See, as to allegations that the foreign judgment is contrary to justice, or erroneous in fact and law, *De Cosse Brissac* v. *Rathbone*, 6 H. and N. 301.

(*e*) See, upon this subject generally, Erak. i. 2; Stair ii. 3; Kames' Equity 480, 490; Ross' Lectures i. 279.

to questions of no little difficulty and importance: *e.g.*, What are the extent and limits of the jurisdiction so created?—how far it is exclusive? In what cases the judgments of such special tribunals are final, and to what extent and in what circumstances they are subject to review? The reported decisions upon such matters are sufficiently numerous, both in this country and in England; but though they will be found to contain general principles of great value, it can hardly be said that the subject has been exhausted, or that any set of rules has yet been elaborated which can be confidently relied on as decisive of every question that may arise in practice. This is partly attributable to the fact that the phraseology employed by the Legislature presents considerable variety, and is not always characterized by technical accuracy; and partly to the circumstance that the Supreme Courts, in their anxiety to do substantial justice, have not always been very consistent in their interpretation of the statutory words. The following, however, is submitted as the general import of the decided cases:—

When statutory courts have exclusive jurisdiction.

When a new civil jurisdiction is created by statute, with a power of judging in special matters, the jurisdiction of the tribunal formerly competent to that species of causes is not thereby held to be ousted, unless the statute expressly declares the jurisdiction of the new court to be exclusive (*a*). But the case is different where the subject-matter of the causes intended to be dealt with by the new jurisdiction is purely the creation of the statute, and could not, except for the interference of the Legislature, have had any existence. Here the statutory tribunals seem to have exclusive jurisdiction (*b*). Thus, the compensation due to persons whose lands are taken for the construction of railways in virtue of and in accordance with the provisions of the special act, can only be assessed by the special tribunals which the Legislature has appointed for that purpose (*c*).

No encroachment on the ordinary tribunals inferred.

On the other hand, no encroachment on the jurisdiction of the ordinary tribunals is to be presumed; but the jurisdiction of the new statutory tribunals is limited to the purposes and sphere of

(*a*) Ersk. i. 2, 7; Stair ii. 3, 32. *Bremner* v. *Huntly Friendly Society*, 1817, 19 F. C. 416.

(*b*) Ersk., *supra*; Stair, *supra*; *Edinburgh, Perth, and Dundee Ra. Co.*, 1850, 22 Jur. 573.

(*c*) See cases in note (*a*), p. 501.

operations specified by the statute. Hence it follows, that compensation cannot be obtained before the statutory tribunals for damage caused by railway companies in the completion of their lines, when such damage has not been caused by acts done in virtue of and in conformity with their statutory powers. Such proceedings, if illegal, must be remedied by having recourse to the ordinary courts (*a*); and if not illegal, as sometimes happens, found no claim for compensation in any court (*b*).

Existing tribunals receiving statutory jurisdiction.

When the Legislature gives a new special jurisdiction to an existing tribunal, this does not in anywise affect its common law jurisdiction, which remains intact in all matters not specially regulated by the statute (*c*).

Exclusive jurisdiction of statutory courts may be got over.

Even where special tribunals have been created with exclusive jurisdiction for dealing with claims arising in consequence of the exercise of special statutory powers, the parties may, by converting the statutory claims into matter of agreement, bring themselves under the jurisdiction of the ordinary courts (*d*).

Review of Supreme Court, when excluded.

All new statutory jurisdictions are presumed to be subordinate, and therefore subject to the review of the Supreme Courts, unless the contrary is so expressed by the Legislature as to exclude all doubt (*e*). The mere use of words expressing finality will not exclude review, but will be held to mean that the statutory tribunal has power to exhaust the cause in the first instance; and the specific exclusion of one mode of review will not be held to imply the exclusion of others (*f*). If, however, the statutory words admit of no other interpretation, all review will be excluded (*g*).

Review always competent when there is excess of jurisdiction.

But however express may be the statutory provisions excluding review, they will not be interpreted to exclude the intervention of the Supreme Court when the statutory tribunal has exceeded its

(*a*) *Goldie* v. *Oswald*, 1814, 2 Dow 534; *Shand* v. *Henderson*, 1814, 2 Dow 519; *Burnet* v. *Knowles*, 1815, 3 Dow 280.

(*b*) See cases in note (*b*), p. 501.

(*c*) *Edin. and Glasgow Ra. Co.* v. *Cadder Road Trs.*, 1842, 5 D. 218.

(*d*) *Hutchison* v. *Edin. and Glasgow Ra. Co.*, 1848, 10 D. 760.

(*e*) Ersk. i. 2, 7.

(*f*) *Guthrie* v. *Cowan*, 1807, 14 F. C. 43, M. App. Juris. 17; *Anderson* v. *Campbell*, 1811, 16 F. C. 207; *Key* v. *Stirling, etc.*, 1830, 9 S. 167; *Sim* v. *Hodgert*, 1831, 9 S. 507; *MacLoughlan* v. *Evans*, 1859, 21 D. 532, aff. 1861, 23 D. (H. of L.) 1, 4 Macq. 89.

(*g*) *Chivas* v. *Duke of Gordon*, 1804, 13 F. C. 398, M. App. Juris. 12; *Lang* v. *Craig*, 1833, 11 S. 424; *Lindsay* v. *Orr*, 1831, 9 S. 426; *Tay Ferry Trs.* v. *Stewart and Merchant*, 1824, 2 S. 550–1 and 622.

powers, or plainly travelled out of its jurisdiction (*a*). Where the question of competency and the merits are mixed up together, the Court will interfere (*b*); and where the proceedings of the statutory tribunal have been so irregular as to amount to a violation of the provisions of the Act, the Court may order them to be begun and proceeded with *de novo* (*c*).

Court of Session may interpret the statute *prima instantia.*

When a question is raised as to what claims are authorized to be made for compensation under an Act, it may be determined *prima instantia* by the Court of Session (*d*).

DECLINATURE OF JUDGE.

Rules regarding.

When a judge is interested as a partner or shareholder in a mercantile partnership or company, it is a good ground of declinature (*e*); but where the grounds of declinature apply to so many judges, that, were they to be sustained, the cause could not be decided, the declinator will be repelled *ex necessitate* (*f*). It has, moreover, long been fixed, that a judge may deliberate and vote in a cause affecting a corporation in which he holds stock (*g*). By Act of Sederunt 1st Feb. 1820, it was declared that the fact of a judge holding shares or stock in a chartered bank is no ground of disqualification; and the principle of this Act has been held to apply where a near relation of a judge holds shares in other chartered companies (*h*).

(*a*) *Fraser* v. *Burnet*, 1806, Hume 256; *Grant* v. *Gordon*, 1833, 12 S. 167; *Brown* v. *Heritors of Kilberry*, 1825, 3 S. 334, 1826, 4 S. 176, aff. 1829, 3 W. S. 441; *Tennant* v. *Turner*, 1837, 16 S. 192; *Graham* v. *Caled. Ra. Co.*, 1848, 10 D. 495; *Edin. and Glas. Ra. Co.* v. *Cadder Road Trs.*, 1842, 5 D. 218. See *Scott* v. *Anderson*, 1832, 10 S. 760; *Brown* v. *Richmond and Co.*, 1833, 11 S. 407; *Guthrie* v. *Millar*, 1827, 5 S. 663.

(*b*) *Edin. and Glas. Ra. Co.* v. *Earl of Hopetoun*, 1840, 2 D. 1255.

(*c*) *Young* v. *Milne*, 1814, 17 F. C. 664; *Fraser* v. *Burnet*, 1806, Hume 256.

(*d*) *Macdonell* v. *Caled. Canal Comrs.*, 1830, 8 S. 881.

(*e*) Shand's Prac. i. 60; *Douglas, Heron, and Co.* v. *Earl of Galloway*, 1774, 5 Brown's Sup. 424; *Maclean* v. *Muness*, 1776, 5 Brown's Sup. 455; *Aberdeen Town and County Bank* v. *Scot. Equit. Insur. Co.*, 1859, 22 D. 162.

(*f*) Shand's Prac. i. 61; *Friendly Insur. Co.* v. *Royal Bank*, 1749, Elch. Jurisd. No. 50; *Blair* v. *Sampson*, 1814, 18 F. C. 501; A. S. 22 July 1774, and 22 Jan. 1789; *Hercules Insur. Co.* v. *Hunter*, 1837, 15 S. 800.

(*g*) *Bank of Scotland* v. *Ramsay*, 1738, 5 Brown's Sup. 206; *Anderson* v. *Bank of Scotland*, 1840, 15 F. C. 547.

(*h*) *Speirs* v. *Ardrossan Canal Co.*, 1823, 2 S. 221; *Friendly Insur. Co.* v. *Royal Bank*, *supra.*

Rule in House of Lords.

It is a rule of the House of Lords, that a peer will not take part in hearing an appeal in which a company of which he is a shareholder is a party; and it has been doubted whether this rule could be altered otherwise than by statute (*a*).

(*a*) *London and North-West. Ra. Co.* v. *Lindsay*, 1858, 3 Macq. 114.

CHAPTER VI.

CITATION OR SERVING OF PROCESS.

I. FIRMS AND COMMON LAW COMPANIES.

General rules.

As has already been seen, there are three ways in which associations of this kind may be called as defenders, viz.: 1. By making all the partners defenders; 2. By calling the company in its descriptive name, with joinder of at least three partners; and 3. By the social name in which the firm signs obligations. Whichever of these forms has been adopted, service must be made on the *quasi* person of the company. This is done by leaving a copy with one of the partners, or other known official of the company, at the company's place of business. The place of business is in law the home of the company; and as an individual may have more than one residence, a company may have more than one domicile. This happens as often as a company has two or more offices in which it receives orders and transacts business with its customers. When this is the case, service may be made on the *quasi* person of the company at any of the offices lying within the jurisdiction of the Court (*a*).

With whom the writ should be left.

As to the person with whom the writ ought to be left, the analogy of service on an individual affords a guide. When they can be found present, a partner, or managing official, such as a secretary, is the proper person; but where these cannot be got after due inquiry, it should seem that service on an inferior assistant will suffice (*b*).

(*a*) *Wordie*, 1831, 10 S. 142; *Bishop v. Mersey and Clyde Nav. Co.*, 1830, 8 S. 558; *Aberdeen Ra. Co.*, 1854, 16 D. 422.

(*b*) *Young* v. *Livingstone*, 1860, 22 D. 983.

When the company, being a nominal firm, has been called as such, *i.e.* in the social name, service would seem to be complete when made as above described at the place of business (*a*). But where the company has been called either in the names of all its partners, or by its descriptive name with joinder of three partners, service, it appears, must be made not only on the *quasi* person of the company as above described, but also on each of the partners whose names appear in the writ (*b*). The reason of this requirement is obvious enough, when it is found necessary to call all the known members of the association; for, the same reason which rendered it necessary to call them individually, requires special service for each. It is not so easy to find a reason for this rigour, when it is sufficient to call only three of the individual partners *nominatim;* for in such a case the only reason for calling the three partners at all is the accident of the company trading under a descriptive instead of a social name. Nevertheless the practice has so run, and has now become too inveterate to be disturbed.

Citation is regulated by the mode in which the company is libelled.

When service has to be made on the individual partners, as in the cases mentioned, it must be done in the same way as if they were defending individually; that is to say, either by delivery of the writ to them personally, or in some of the modes which the law holds to be equivalents for personal service. Hence, leaving copies of the writ at the company's place of business, to be delivered to each of the partners, will not be sufficient. This rule must also be adhered to when the company is called in the social name, and one or more of the partners are also called as individuals.

When service is necessary on individual partners.

If a single individual has contracted an obligation as though he were a firm or company, and he is sued thereon as such, he cannot object to the validity of a citation which would have been effectual if he had been a company according to his misrepresentation (*c*).

Where single individual trades as a company.

It may here be observed, that where a company sues one of its own members or partners, he must be called as a defender, and service of the writ must be made on him in the same way as if he were a stranger. The company place of business is not to be taken as the residence of the individual partners.

Actions *inter socios.*

(*a*) *Forsyth* v. *Hare*, 1834, 13 S. 50.
(*b*) Cases last quoted.
(*c*) *Young* v. *Livingstone*, 1860, 22 D. 983.

II. CORPORATIONS.

General rules.

In citing such associations, attention must be paid to the provisions of the special act, charter, letters patent, or other instrument incorporating the company, or conferring on it the privileges of suing and being sued. If no provision has been made for citation, service must be made on the person of the company, by leaving a copy of the writ at its place of business in the hands of some of its principal officials, such as a manager, secretary, treasurer, or director. Perhaps, where these cannot be found, an inferior office-bearer may suffice; but a mere partner or member, as such, will not be sufficient, as he can in no sense be considered an agent for the corporation.

Companies Clauses Act, 1845.

In the case of companies formed under the Act 1845, the writ is served either by being left at, or transmitted through the post directed to, the principal office of the company, or one of its principal offices where there are more than one, or by being given personally to the secretary, or in case there be no secretary, by being given to any one director of the company (sec. 137).

In a summons against a railway company and the directors *nominatim*, of which the conclusions were directed against the 'said defenders,' and the warrant to cite was to summon 'the said defenders personally or at their respective dwelling-places,' and the company was cited by delivering a copy to the secretary personally, within their place of business; it was held that this was a good citation of the company, the other parts of the warrant being held mere surplusage (*a*).

Notices.

Notices, but not summonses or other judicial writs, requiring to be served by the company on a shareholder, may, unless personal service is required, be served by being left at or posted in accordance with the shareholder's registered or other known address, in time to admit of delivery in due time. Service will be proved by showing that the notice was duly addressed and posted (sec. 138). Notice to joint proprietors of shares is sufficiently given when it is served on him whose name stands first on the register (sec. 139).

(*a*) *Stewart* v. *Midland Junction Ra. Co.*, 1852, 14 D. 594. See *Glasgow and Airdrie Ra. Co.* v. *Tennent*, 1848, 11 D. 212.

Notices requiring to be given by advertisement, must be inserted in the prescribed newspaper; and if none be prescribed, or if it has ceased to be published, then in a newspaper circulating where the company's chief place of business is situated (sec. 140).

Actions against members.

It need hardly be observed, that when the company sues one of its members, he must be called and cited in the same way as a stranger, the above compendious modes of service being applicable only to notices required to be given by the general or special act.

The company may be represented by its secretary or treasurer in all proceedings connected with the bankruptcy or insolvency of its debtors (sec. 142).

Companies Act of 1862.

In the case of companies registered under the Act of 1862, any summons, notice, order, or other document requiring to be served upon the company, may be served by leaving the same, or sending it through the post in a prepaid letter addressed to the company at their registered office (sec. 62) (*a*). Where in England a company is proposed to be wound up, but has no place of business, the Court, on an *ex parte* application, is in use to direct service of the winding-up petition to be made on the chairman or general manager (*b*).

Service by post.

Writs or other documents to be served by post on the company, must be posted in time to admit of delivery within the required period of service; and in proving service, it is sufficient to show that they were properly addressed and posted as prepaid letters (sec. 63). The post-office mark, it may be observed, is not conclusive evidence of the time when a letter was posted (*c*).

Notices.

If the regulations of Table A, Schedule I., be adopted as the articles of association, notices may be served by the company on any member, either personally, or by sending them through the post in a prepaid letter addressed to such member at his registered place of abode (No. 95). All notices directed to be given to members with respect to shares, to which more persons than one are jointly entitled, must be served on whichever of such persons is named

(*a*) See, on this subject, the English case of *Towne* v. *London and Limerick Steam-ship Co.*, 5 C. B. (N. S.) 730.

(*b*) *National Credit and Exchange Co. (Limited), re* Companies Act, 1862, 11 W. R. 161. See also *Gaskell* v. *Chambers*, 26 Beav. 252.

(*c*) *Stocker* v. *Collin*, 7 M. and W. 515; *Hawkins* v. *Rutt*, Peake N. P. C. 186; *Hilton* v. *Fairclough*, 2 Camp. 633.

first in the register of members; and notice so given is sufficie notice to all (No. 96). Any notice served by post will be deem to have been served at the time when the letter containing it wou be delivered in the ordinary course; and in proving such service is sufficient to establish that the letter was properly addressed a posted (No. 97).

8 and 9 Vict. c. 19.

The Lands Clauses Act provides as follows in relation to a matters to which it applies. Summonses or notices, and all wri or other proceedings at law or equity, requiring to be served on th company, may be served by the same being left at or transmitte through the post, directed to the principal office, or one of th principal offices, where there is more than one, or by being give personally, or transmitted through the post, directed to the secretar or in case there be no secretary, by being given to the solicitor the company (sec. 128).

18 and 19 Vict. c. 88.

Copartneries registered under the 'Dwelling-Houses Scotlan Act, 1855,' are *quasi* corporations, and are cited apparently in th same way as proper corporations (sec. 3).

CHAPTER VII.

PARTICULAR ACTIONS AND FORMS OF PROCEDURE.

HAVING now considered the general principles and rules which govern the rights of companies and their members to sue and be sued, it will be necessary to examine some of the more special forms of legal procedure in which such associations or their members may be involved.

INTERDICT.

Form of procedure.

When anything is in contemplation to be done which is contrary to existing law or to the provisions of a binding contract, the Court will generally interfere at the suit of parties having a proper interest to prevent its being carried into execution. This in England is done by injunction, granted by the Courts of Chancery or Exchequer; in Scotland by interdict granted by the Court of Session, or an inferior court having the requisite jurisdiction. When the application is made in the Supreme Court, it takes the form of a suspension and interdict; when in an inferior court, that of a petition for interdict. If the act complained of has been already done, the remedy by interdict does not apply; but recourse must be had to declarator (*a*).

Purposes of interdict.

The interference of the Court by interdict is often sought when in private firms partners are about to transgress the provisions, express or implied, of the partnership contract; and in public companies when similar improprieties are contemplated by the directors or a majority of the shareholders; and generally when anything is proposed to be done by the firm or company, or any of its members,

(*a*) *Per* Lord Chan. in *Fleming* v. *Newton*, 1848, 6 Bell's App. 175, 20 Jur. 229; *Shand* v. *Henderson*, 1814, 2 Dow 519.

whereby the rights and interests of the others are injuriously affected. This remedy is also available to any of the public who can show that they will be injured by the intended acts of a firm, company, or corporation. But it must be observed, that no one is entitled to obtain an interdict against wrongful acts in the abstract, without at least showing reasonable grounds of apprehension, *e.g.* that they have been resolved upon, have been actually commenced, or are in course of completion (*a*).

Principles of granting, in private partnerships;

In general, the courts are slow to interfere between the members of private copartneries: for it is evident that unless the partners agree to bear and forbear with each other's infirmities of temper, peculiarities of disposition, or occasional deviations from what may be deemed the strict line of duty, all combined action is impossible; and experience has shown that when disagreements of an important kind arise, and are likely to continue, a dissolution of the partnership will generally be found the most desirable, and perhaps the only effectual remedy. When, however, the improprieties complained of are of a serious kind, and would make themselves felt notwithstanding dissolution, or if that cannot be brought about, the interference of the Court by interdict will generally be obtained.

in public companies.

In public companies, whether corporate or unincorporate, the same objections to judicial interference do not exist, for the shareholders do not stand to each other in the same intimate relation as partners of a firm; nor is the same exuberant trust in each other necessary for the successful prosecution of the undertaking, the management being entrusted to special officials or a board of directors. While, therefore, the courts will not readily interfere with the management of the company's affairs, where the irregularities alleged to be in contemplation may be checked by other means, they will at once interdict any contemplated proceedings which are plainly contrary to or irreconcilable with the scope and purposes of the company as defined in its instrument of formation.

Interdict by strangers.

When interdict is sought by strangers against acts contemplated by firms or companies, the Court will interfere whenever such interference would be proper between private individuals.

These general principles will be best explained and illustrated by reference to the decided cases; and as the grounds upon which

(*a*) *King* v. *Hamilton*, 1844, 6 D. 399.

injunction is granted in England are for all practical purposes the same in relation to the present subject as those which warrant interdict in Scotland, the examples we are now to give will be taken indifferently from the practice in both countries.

PRIVATE PARTNERSHIP.

Examples of this remedy.

Injunction has been granted—to restrain a retiring partner from carrying on the business of the firm with new partners (*England* v. *Curling*, 8 Beav. 129); to prevent a partner from being excluded from his share of the management (*Hall* v. *Hall*, 3 Mac. and G. 79; *Anon.*, 2 K. and J. 441); to restrain a partner from acting contrary to the conditions of the partnership articles (*Morris* v. *Colman*, 18 Ves. 437; *Glassington* v. *Thwaites*, 1 Sim. and Stu. 124); to restrain a partner from obstructing the partnership business (*Charlton* v. *Poulter*, 19 Ves. 148, n.; *Smith* v. *Jeyes*, 4 Beav. 503); from abusing his powers of agency in granting bills, etc. (*Jervis* v. *White*, 7 Ves. 412; *Williams* v. *Bingley*, Coll. 233), and in recovering debts (*Read* v. *Bowers*, 4 Bro. C. C. 440); from keeping up partnership books (*Greatrix* v. *Greatrix*, 1 De G. and Sm. 692); from holding out another as partner with him (*Troughton* v. *Hunter*, 18 Beav. 470; *Bullock* v. *Chapman*, 2 De G. and Sm. 211); to enforce special agreements, such as not to recover debts or divulge trade secrets (*Morison* v. *Mouat*, 9 Ha. 241; *Davis* v. *Armer*, 3 Drew. 64); to protect a partner from interference by representatives of a late partner (*Davidson* v. *Napier*, 1 Sim. 297; *Freeland* v. *Stansfield*, 2 Sm. and G. 479; *Alder* v. *Fouracre*, 3 Swanst. 489); to restrain a late partner from carrying on a business in breach of an agreement not to do so (*Churton* v. *Douglas*, 1 Johns. 174; *Whittaker* v. *Howe*, 3 Beav. 383).

Interdict has been granted against the partner of a company selling bills by auction, accepted by him in the company's name (*Taylor and Sons* v. *Taylor*, 1823, 2 S. 143) (*a*).

PUBLIC COMPANIES.

General observations.

The reported cases in which the interference of the courts has been sought by a minority of shareholders against the contemplated

(*a*) See *Reid* v. *Maxwell*, 1852, 14 D. 449.

acts of a majority, or of those charged with the executive management, are very numerous both in this country and in England. Read one with another, they may be taken as embodying the following general rules:—Judicial interference will be obtained to restrain from doing that which is plainly beyond or irreconcilable with the purposes for which the association was formed, or which, if carried out, would in effect alter the constitution of the company, *e.g.* converting a railway company into a canal company, making a different railway from that for which the company was formed, and making important alterations on the internal management; from depriving shareholders of their rights to share in the management and in the profits of the concern; from misapplication of the company credit or funds; from holding meetings irregularly called; and generally from doing anything manifestly unjust to the interests of even a single shareholder, or tainted with fraud on the shareholders or the public. But the courts will decline to interfere where the course proposed to be adopted by the majority or by the managing body is fairly within the limits of their discretionary powers, either express or implied, even though that suggested by the petitioners appears to the Court to be more prudent or advisable; where interdict is sought on grounds of a trifling or technical nature; and, in general, where the proceedings complained of might be remedied by making use of the machinery provided for that purpose by the company's constitution, unless where immediate interference is necessary to prevent irremediable mischief.

Mode of arranging cases.

With the view of elucidating this branch of the subject, it was originally intended to arrange the more important decided cases into two great classes, viz. those in which interdict had been granted, and those in which it had been refused; and lists were accordingly prepared for this purpose. On more mature consideration, however, the author was induced to abandon this intention for the reasons to be immediately given. When judicial intervention is obtained by injunction in England or by interdict in Scotland, the courts act in virtue of an equitable jurisdiction, and take into consideration the whole circumstances and specialties of the particular case. The consequence of this is, that while a cursory glance at the decisions, or an examination confined to the rubrics, may lead to the inference that the power of intervention has been anoma-

lously or capriciously exercised, this will generally be removed when the whole facts that were before the Court have been duly weighed and appreciated; so that, in considering what will be done in a particular case, the practitioner is in continual danger of being misled by decisions which are precedents merely in superficial appearance, but whose true *ratio decidendi* was the presence of an element which does not exist in the case with which he is concerned, or is neutralized by considerations of greater importance. It thus appears, that lists of cases in which interdict was refused on the one hand and granted on the other, would be more apt to mislead than to guide, unless they were to be accompanied with a statement of the circumstances of each case in much greater detail than could be admitted into a work of this kind. Instead, therefore, of following out the original design, the more important cases have been arranged under appropriate headings, and a particular perusal of the reports to which reference is made is specially requested.

Interdict in public companies *inter socios.*

Improperly entering or continuing a person's name on the register of shareholders: *Shortridge* v. *Bosanquet*, 16 Beav. 84; *Taylor* v. *Hughes*, 2 Jo. and Lat. 24; *Bullock* v. *Chapman*, 2 De G. and S. 211.

Issuing of preference shares: *Edwards* v. *Shrewsbury Ra. Co.*, 2 De G. and Sm. 537.

Issuing of shares for a different purpose from that intended: *Fraser* v. *Whalley, etc.*, 11 Law T. N. S. 175.

Making improper transfers of stock or shares: *Ardrossan Ra. Co.* v. *Glasgow, Kilm., and Ardrossan Ra. Co.*, 1850, 12 D. 687; *Williamson* v. *North British Ra. Co.*, 1846, 9 D. 255; *Fife* v. *Swaby*, 16 E. Jur. 49.

Improper making of calls: *Bailey* v. *Birkenhead Ra. Co.*, 12 Beav. 433; *Preston* v. *Grand Coll. Dock Co.*, 11 Sim. 327; *Orr* v. *Glasgow, Airdrie, etc., Ra. Co.*, 1860, 3 Macq. 799, aff. 20 D. 327; *Hodgkinson* v. *Nat. Insur. Co.*, 26 Beav. 473; *Harris* v. *North Devon Ra. Co.*, 20 Beav. 384; *Playfair* v. *Bristol Ra. Co.*, 1 Ra. Ca. 640; *Logan* v. *Courtown*, 13 Beav. 22; *Cooper* v. *Shropshire Ra. Co.*, 6 Ra. Ca. 136; *Norman* v. *Mitchell*, 19 Beav. 278.

Improprieties in management.—Holding meetings without due notice to all entitled to receive it: *Cargill* v. *Sir J. Forrest*, 1851,

1 Stu. 91. Irregularities in appointment of directors: *Blackburn* v. *Buchanan*, 1848, 10 D. 590, 20 Jur. 199. Non-fulfilment of contracts: *Ritchie* v. *Scottish Central Ra. Co.*, 1847, 20 Jur. 62.

Illegal forfeiture of shares: *Naylor* v. *South Devon Ra. Co.*, 1 De G. and Sm. 32; *Watson* v. *Eales*, 23 Beav. 294; *Preston* v. *Grand Coll. Dock Co.*, 2 Ra. Ca. 335; *Norman* v. *Mitchell*, 5 De G. Mac. and G. 648.

Suspension of a shareholder's rights: *Adley* v. *Whitstable Co.*, 1 Mer. 107.

Granting leases of a railway in perpetuity: *Wedderburn* v. *Scottish Central Ra. Co.*, 1848, 10 D. 1317. And delegating statutory powers: *Beman* v. *Rufford*, 7 Ra. Ca. 48; *Great Northern Ra. Co.* v. *Eastern Counties Ra. Co.*, 9 Hare 306; *Winch* v. *Birkenhead Ra. Co.*, 16 E. Jur. 1035, 7 Ra. Ca. 384; *Simpson* v. *Denison*, 10 Hare 51; *London and North-Western Ra. Co.* v. *Scottish Central Ra. Co.*, 1847, 10 D. 215. Transferring of the company business to another company: *Charlton* v. *Newcastle Ra. Co.*, 5 E. Jur. N. S. 1096; *Winch* v. *Birkenhead Ra. Co.*, *supra*; *Hattersley* v. *Earl of Shelburne*, 10 W. R. 881.

Changing the constitution of the company: *Learmonth* v. *Leadbetter*, 1841, 3 D. 1192.

Changing the purposes for which the company was formed: *Colman* v. *Eastern Counties Ra. Co.*, 10 Beav. 1; *Natusch* v. *Irving*, Gow on Part. 398; *Salomons* v. *Laing*, 12 Beav. 377; *Simpson* v. *Denison*, 10 Ha. 51; *Bagshaw* v. *Eastern Ra. Co.*, 7 Ha. 114; *Forrest* v. *Manchester Ra. Co.*, 7 E. Jur. N. S. 887; *Simpson* v. *Westminster Hotel Co.*, 8 House of Lords Cases 712.

Carrying out purposes of formation in part only: *Hodgson* v. *Powis*, 12 Beav. 392; *Cohen* v. *Wilkinson*, 12 Beav. 125.

Misapplication of company funds: *National Exchange Co.* v. *Glasgow and Ardrossan Ra. Co.*, 1849, 11 D. 571; *Brown* v. *Adam*, 1848, 10 D. 744; *Stephenson and Co.* v. *Caled. Ra. Co.*, 1851, 23 Jur. 426; *Wilson* v. *Glasgow and South-Western Ra. Co.*, 1850, 13 D. 227; *Graham* v. *North British Bank*, 1849, 11 D. 1165; *Balfour* v. *Edinburgh and Northern Ra. Co.*, 1848, 10 D. 1240; *Blackburn* v. *Stewart*, 1851, 13 D. 1243.

Amalgamation of companies: *Gilbert* v. *Cooper*, 10 E. Jur. 580.

Misapplication of money raised on preference shares: *Yetts* v. *Norfolk Ra. Co.*, 3 De G. and Sm. 293.

Borrowing of money by a limited company: *Bryan* v. *Metropolitan Saloon Omnibus Co.*, 3 De G. and J. 123.

Sale of company property: *Fleming* v. *Campbell*, 1845, 7 D. 935.

Return of deposits: *Kent* v. *Jackson*, 14 Beav. 367.

Illegal payment of dividends: *Carlisle* v. *South-Eastern Ra. Co.*, 1 Mac. and G. 689; *Sturge* v. *Eastern Union Ra. Co.*, 7 De G. Mac. and G. 158; *Adely* v. *Whitstable Ra. Co.*, 17 Ves. 315; *Crawford* v. *North-Eastern Ra. Co.*, 3 K. and J. 723; *Henry* v. *Great Northern Ra. Co.*, 4 K. and J. 1.

Payment of dividends before payment of debts or completion of company works: *Stevens* v. *South Devon Ra. Co.*, 9 Ha. 326; *Brown* v. *Monmouthshire Ra. Co.*, 13 Beav. 32; *Fawcett* v. *Lawrie*, 1 Dr. and Sm. 192.

Issuing of reports by directors which are unwarranted or *ultra vires*: *Stewart* v. *Blackburn*, 1850, 12 D. 834.

Continuance in office of directors alleged to be unduly elected: *Inderwick* v. *Snell*, 2 Mac. and G. 216; *Hattersley* v. *Shelburne*, 10 W. R. 881.

Abandonment by a railway company of its works when it had not means for their completion: *Logan* v. *Courtown*, 13 Beav. 22.

Assignation of company property to trustees to realize and pay its debts: *Lord* v. *Governor and Co. of Copper Miners*, 2 Ph. 740.

Making of loans to directors: *Bluck* v. *Mallalue*, 5 E. Jur. N. S. 1018.

Managing of company affairs by directors, no attempts having been made to control their proceedings before application for judicial interference: *Foss* v. *Harbottle*, 2 Ha. 461; *Carlen* v. *Drury*, 1 V. and B. 154; *Stevens* v. *South Devon Ra. Co.*, 9 Ha. 326; *Mozley* v. *Alston*, 1 Ph. 700; *Waters* v. *Taylor*, 15 Ves. 10; *Yetts* v. *Norfolk Ra. Co.*, 3 De G. and Sm. 293.

Interdict to restrain application to Parliament;

In some cases attempts have been made to obtain an interdict against companies or some of their members applying to Parliament for special acts changing the constitution of the company, or enabling it to do that which would otherwise be incompetent. To grant interdict for such a purpose would seem to be a total perver-

sion of that form of process, if indeed it ought not to be regarded as illegal, and therefore a nullity. The Court of Session have accordingly always refused such applications (*a*); and the same course has generally been followed by the Court of Chancery (*b*). A distinction, however, exists between the right to apply to Parliament, which is the inalienable privilege of every British subject, and the right to do so at the expense of others. Accordingly, the Court of Chancery have, at the instance of a single dissentient shareholder, granted an injunction to restrain the application of company funds in defraying the expense of obtaining an Act to alter the company's constitution, or to confer powers not contemplated in the instrument of its formation (*c*); and the Court of Session have granted interdict at the instance of a dissenting minority, against a majority applying the company funds towards the expenses of a new application to Parliament for a special act, after the first application had proved unsuccessful (*d*).

to restrain legal proceedings.

Interdict will be granted against parties to an existing process commencing new proceedings before another tribunal or in a foreign country, if it be made to appear that such restraint is necessary to attain the ends of justice, or to prevent oppression or embarrassment.—*Dawson's Trs.* v. *Macleans*, 1860, 22 D. 685; *Todd* v. *Clyde Trs.*, 1843, 6 D. 108; *Lindsay* v. *Paterson*, 1840, 2 D. 1373. The Court refused to restrain a company proceeding with a jury trial under their act, on the ground that the required amount of capital was not subscribed.—*Phin* v. *Brisbane*, 1839, 1 D. 1142. Interdict has been granted in Scotland, notwithstanding the dependence of an application for injunction in England.—*Anderson* v. *M'Nair and Brand*, 1859, 21 D. 257.

(*a*) *Wedderburn* v. *Scottish Central Ra. Co.*, 1848, 10 D. 1317; *Anstruther* v. *East of Fife Ra. Co.*, 1849, 12 D. 127, aff. 1852, 1 Macq. 98, 24 Jur. 419.

(*b*) *Ware* v. *Grand Junction Water Co.*, 2 R. and M. 470; *Hattersley* v. *Earl of Shelburne*, 10 W. R. 881; *Bill* v. *Sierra Nevada Mining Co.*, 1 De G. F. and J. 177. The application in this case was to a foreign Legislature.

(*c*) *Munt* v. *Shrewsbury and Chester Ra. Co.*, 13 Beav. 1; *Simpson* v. *Denison*, 10 Hare 51; *Vance* v. *Eastern Lancashire Ra. Co.*, 3 K. and J. 50; *Attorney-General* v. *Andrews*, 14 E. Jur. 124; *Cunliff* v. *Manchester and Bolton Canal Co.*, 2 R. and M. 480, n.

(*d*) *Brown* v. *Sir C. Adam*, 1848, 10 D. 744.

INTERDICT IN QUESTIONS BETWEEN PUBLIC COMPANIES AND STRANGERS.

For the reasons given above, we shall classify the more important cases according to their subject-matter, as was done in the previous section.

Interdict between company and strangers.

Entry on lands by a company possessing aggressive powers before a bargain has been concluded for the lands: *Dalgliesh* v. *Stirling and Dunferm. Ra. Co.*, 1847, 9 D. 505;—or before paying the price: *Hyde* v. *Great Western Ra. Co.*, 1 Ra. Ca. 277; *Robertson* v. *same*, 1 Ra. Ca. 459; *Jones* v. *same*, *ibid.* 684. Proceeding with the works before settlement of claims for compensation, and arrangements as to accommodation works: *Black* v. *Formartine and Buchan Ra. Co.*, 1861, 23 D. 600.

Entry on lands not covered by the notice: *Campbell Renton* v. *North Brit. Ra. Co.*, 1845, 8 D. 247. Interdict will not be granted unless it clearly appear that the company are about to commit a trespass: *Standish* v. *Mayor of Liverpool*, 1 Drew 1; *Fooks* v. *Wilts, Somerset, and Weymouth Ra. Co.*, 4 Ra. Ca. 210. See *Campbell Renton* v. *North British Ra. Co.*, *supra*; *Dalgliesh* v. *Stirling and Dunferm. Ra. Co.*, 1847, 9 D. 505.

Carrying through a compulsatory sale of lands or interests not covered by the statutory powers: *Todd* v. *Clyde Trs.*, 1843, 6 D. 108; *River Dun Nav. Co.* v. *North Midland Ra. Co.*, 1 Ra. Ca. 135; *Stone* v. *Commercial Ra. Co.*, 4 My. and C. 122; *Mouchet* v. *Great Western Ra. Co.*, 1 Ra. Ca. 567. Taking lands or executing works contrary to previous agreement: *Duke of Norfolk* v. *Tennant*, 16 E. Jur. 398; *Lord Petre* v. *East. Counties Ra. Co.*, 1 Ra. Ca. 462.

Formation of works not sanctioned by the special act: *Buchanan* v. *Caled. and Dumbarton Ra. Co.*, 1850, 12 D. 778;—or contrary to the provisions of the Railway Acts: *Coats* v. *Clarence Ra. Co.*, 1 Russ. and My. 181; *Kemp* v. *London and Brighton Ra. Co.*, 1 Ra. Ca. 495; *Attorney-Gen.* v. *Eastern Counties Ra. Co.*, 2 Ra. Ca. 823; *Bell* v. *Hull and Selby Ra. Co.*, 1 Ra. Ca. 616; *Manser* v. *North. and East. Counties Ra. Co.*, 2 Ra. Ca. 380; *Baxter* v. *North British Ra. Co.*, 1846, 8 D. 1212.

Acquiring lands by agreement in excess of the statutory powers: *Cunningham* v. *Edinr. and North. Ra. Co.*, 1847, 9 D. 1469.

Proceeding with injurious operations alleged to be intended when the company had previously done similar illegal acts: *Hoyle, etc.*, v. *Shaws Water Works Co.*, 1854, 17 D. 83. See *Dawson* v. *Paver*, 4 Ra. Ca. 81.

Doing more damage in carrying on the operations allowed than the necessity of the case requires: *Manser* v. *North. and East. Counties Ra. Co., supra.*

Acquiring land after elapse of the statutory time: *Edinburgh and Glasgow Ra. Co.* v. *Monklands Ra. Co.*, 1850, 13 D. 145.

Interdicts in relation to roads proposed to be taken by a company with aggressive powers.—See *Campbell* v. *Edinburgh and Glasgow Ra. Co.*, 1855, 17 D. 613; and 1859, 21 D. 265; and 1861, 23 D. 1182, aff. 1863, 1 Macph. (H. of L.) 53. In relation to obstructing roads, see *Semple* v. *London and Birmingham Ra. Co.*, 1 Ra. Ca. 480.

Interdict has been refused, when applied for by a trader using a line of railway, against the company exacting higher fares than were contained in a table of tolls alleged to have been agreed upon between the railway and another company.—*Finnie* v. *Glasgow and South-Western Ra. Co.*, 1855, 17 D. 1127; aff. 1857, 20 D. (H. of L.) 3, 3 Macq. 74. As to tolls generally, see same case, 1856, 18 D. 325.

Interdict to restrain proceedings injurious to minerals. See *Baird* v. *Monklands Iron and Steel Co.*, 1862, 24 D. 1418; *Fraser* v. *Edinburgh and Glasgow Union Canal Co.*, 1830, 9 S. 46; *Irving* v. *Leadmills Mining Co.*, 1856, 18 D. 833; *Caledonian Ra. Co.* v. *Buchanan*, 17 D. 996.

Interdict against nuisances. See *M'Culloch* v. *Wallace*, 1846, 9 D. 32; *Magistrates of Edinburgh* v. *Edinburgh, Leith, and Granton Ra. Co.*, 1847, 19 Jur. 421; *Broadbent* v. *Imperial Gas Co.*, 7 H. L. C. 600; *Attorney-General* v. *Sheffield Gas Co.*, 3 De G. M. and G. 304.

Interdict in relation to the use of terminal stations jointly possessed by two companies. See *North British Ra. Co.* v. *Edinburgh and Glasgow Ra. Co.*, 1853, 16 D. 250.

Matters connected with arbitration: *Anderson* v. *Aberdeen Ra.*

Co., 1850, 12 D. 781; *Wilson* v. *Caledonian Ra. Co.*, 1860, 22 D. 697.

It has been held incompetent to interdict proceedings under a special act, which only provided the remedy of indemnity for loss sustained.—*Douglas* v. *Dundee and Newtyle Ra. Co.*, 1827, 6 S. 329.

It has been held in England, that when it clearly appears that a railway or other company cannot perform the undertaking contemplated by their special act, an owner of lands, through which the contemplated line runs, may obtain an injunction to restrain the company from taking them.—*Agar* v. *Regent's Ra. Co.*, 1 Swanst. 250, n.; *Gray* v. *Liverpool and Bury Ra. Co.*, 10 E. Jur. 364. See also *Lee* v. *Milner*, 2 Y. and Coll. 611; *Hodgson* v. *Earl Powis*, 12 Beav. 529; *Logan* v. *Earl of Courtown*, 13 Beav. 22; *Mayor of King's Lynn* v. *Pemberton*, 1 Swanst. 244.

The Court will not interdict completed operations which have been acquiesced in for years. The remedy in such cases is by declarator.—*Hoyle* v. *Shaws Water Co.*, 1854, 17 D. 83. In all cases, the remedy by interdict must be sought promptly.—*Illingworth* v. *Manch. and Leeds Ra. Co.*, 2 Ra. Ca. 187; *Semple* v. *Lond. and Birmingham Ra. Co.*, 1 Ra. Ca. 120; *Attorney-Gen.* v. *Manch. and Leeds Ra. Co.*, 1 Ra. Ca. 436.

Where the period for completing a line of railway under a contract had elapsed, and where, from the certificate of the Board of Trade, and the interlocutor of the arbiter named in the contract, it appeared that the line was ready for public traffic, the Court interdicted the contractor from retaining possession of the line, although certain operations still remained to be executed, and certain claims were alleged to be still unpaid.—*Castle-Douglas Ra. Co.* v. *Lee, etc.*, 1859, 22 D. 18.

As to interdict under the Traffic Act, 17 and 18 Vict. c. 31, see *Hosie* v. *Edin. and Glas. Ra. Co.*, 1856, 19 D. 65.

Where a note of suspension and interdict had been presented in name of a projected railway company and others, and it turned out that the company was not incorporated, and had besides been dissolved, the Court appointed the note to be amended by withdrawing the instance of the railway company.—*Edin. and Perth Ra. Co.* v. *North British Ra. Co.*, 1846, 9 D. 307. See also *Caled. Ra. Co.*

v. *Buchanan*, 1855, 17 D. 996. See, as to recall of interdi *Dundee Gas Light Co.* v. *Dundee New Gas Light Co.*, 1844, 7 109. As to breach of interdict, *Fleming* v. *Caled. Ra. Co.*, 1847 D. 792; *Hamilton* v. *Caled. Ra. Co.*, 1847, 10 D. 41; revd. part, 1850, 7 Bell's App. 272, 22 Jur. 622.

CHAPTER VIII.

JUDICIAL FACTOR (*a*).

Appointed by the Court of Session.

THE Court of Session being in Scotland the Supreme Court of Law and Equity, and coming in the place of the old Scottish Privy Council, has long been in use to appoint judicial factors for the management and administration of estates subject to litigation, or not protected by any one legally entitled to their management. Anciently, it should seem, sequestration of the estate was in all cases required as a preliminary to the appointment; but though this has been relaxed in modern practice, it would still appear that this is the proper course of procedure in the case of corporations or copartneries (*b*).

How termed in England.

In England, judicial factors are termed receivers, or receivers and managers, according to the nature of their powers and duties (*c*); and even in Scotland they have received this appellation (*d*).

Principles of appointment;

The appointment of a judicial factor on the estate of a firm or company, involves a much greater interference with the company affairs than the mere granting of interdict against certain proceedings complained of; for it takes the management entirely out of the hands of the partners or shareholders, and thus operates as an interdict against their interfering in any way with the company affairs. The Court are therefore very chary in making such appointments, and will not do so unless a very strong case for such interference is made out.

(*a*) Upon this subject generally, see Thoms on Judicial Factors.

(*b*) *Beck*, 1836, 14 S. 1056; *Dixon*, 1832, 10 S. 209; *Morrison*, 1857, 20 D. 276; *Glasgow* v. *Barrhead Ra. Co.*, 1850, 12 D. 1014.

(*c*) Bennet's Receiver, ch. ii. s. 2; Daniell's Chancery Practice, 3d ed., 978.

(*d*) *Duke of Roxburgh*, 1824, 2 Shaw's App. 18.

In private firms, winding up.

Generally speaking, the Court will not appoint a judicial factor to manage the affairs of a private partnership, unless the application is made for the purpose of winding up the concern. The reason of this is, that it would serve no good purpose to perpetuate the existence of a concern which its own partners were unable to manage, and that no limit could well be set to the duration of the appointment (*a*).

Misconduct, etc.

When the concern has not already been dissolved, misconduct on the part of some of the partners is the most common ground on which the appointment of a judicial factor is sought; but if, apart from the alleged wrong-doers, there still remain a sufficient number of partners to manage the concern, the Court will not in general make such an appointment, the proper remedy being by interdict. Hence it is much more difficult to obtain the appointment of a judicial factor where the membership is numerous, than where it consists of only two partners (*b*). It is presumed that when men enter into a partnership, they have full confidence in each other's honesty; and therefore it is not mere squabbling or every piece of apparent misconduct that can be taken as sufficient to warrant the Court to take the management of the concern out of the hands of the partners, and thus break up the original agreement (*c*). When, however, it is plain from the conduct of some of the partners that all confidence is forfeited, a judicial factor will be appointed with the view of winding up the concern. The most common examples of such conduct as is here referred to are the following: Where an attempt is made to exclude a partner from his share of the management, by alleging that he is not a member of the concern, or has no interest in the company property (*d*); where a partner is applying the company property for carrying on a business of his own, or making away with it for unexplained purposes; when he colludes with the company debtors, so as to enable them to escape or delay payment of the company claims; and when,

(*a*) *Goodman* v. *Whitcombe*, 1 Jac. and W. 589; *Hall* v. *Hall*, 3 Mac. and G. 79; *Waters* v. *Taylor*, 15 Ves. 10; *Harrison* v. *Armitage*, 4 Madd. 143; *Oliver* v. *Hamilton*, 2 Anstr. 453.

(*b*) *Hall* v. *Hall*, *supra*.

(*c*) *Rowe* v. *Wood*, 2 J. and W. 556; *Roberts* v. *Eberhardt*, Kay 148.

(*d*) *Peacock* v. *Peacock*, 16 Ves. 49; *Goodman* v. *Whitcombe*, 1 J. and W. 589; *Blakeney* v. *Dufaur*, 15 Beav. 40; *Wilson* v. *Greenwood*, 1 Swanst. 481.

in such cases, the misconduct complained of and established cannot be remedied by interdict (*a*).

When the partnership property, or the interests of the partners therein, has become the subject of mutual litigation, as *e.g.* where one partner has brought an action of reduction of the contract of copartnery, a judicial factor may be appointed *pendente processu* (*b*). When, in an action by one partner against another, the defence is taken, that the alleged partnership is illegal, it has been doubted whether the Court will appoint a judicial factor, unless the application has been made *in initio litis* (*c*). Where a partnership is sought to be judicially established, a factor may be appointed if the case has gone far enough to create a *probabilis causa* (*d*). Mutual litigation.

When a partnership is dissolved by the death of one of the partners, it survives for the purposes of winding up in the surviving partners; and the representatives of the deceased partners are not entitled to have a judicial factor appointed, unless they can make out neglect or improper conduct (*e*). Death.

But though the Court will not without special reasons appoint a judicial factor while one of the partners is in a position to continue the management, the case is very different where the company estate has come under the control of persons other than the partners. When, therefore, all the partners are dead, and their representatives are in possession, a factor will generally be appointed as a matter of course (*f*). The fact that the last surviving partner had appointed trustees for winding up the concern is no reason why the representatives of the other partners should not obtain the appointment of a judicial factor; for though a surviving partner is entitled to wind up the affairs of the company himself, he has no

(*a*) *Madgwick* v. *Wimble*, 6 Beav. 495; *Evans* v. *Coventry*, 5 De G. Mac. and G. 911; *Sheppard* v. *Oxenford*, 1 K. and J. 491; *Harding* v. *Glover*, 18 Ves. 281.

(*b*) *Ex parte Broome*, 1 Rose 69; but see *Macdougall* v. *MacLaurin*, 1839, 1 D. 1241; *Drysdale* v. *Lawson*, 1842, 4 D. 1061.

(*c*) *Sheppard* v. *Oxenford*, 1 K. and J. 491; *Hale* v. *Hale*, 4 Beav. 369.

(*d*) *Fairburn* v. *Pearson*, 2 Mac. and G. 144; *Chapman* v. *Beach*, 1 J. and W. 594.

(*e*) *Collins* v. *Young*, 1853, 1 Macq. 385, reversing 14 D. 540; *Harding* v. *Glover*, 18 Ves. 281; *Lawson* v. *Morgan*, 1 Price 303; *Kershaw* v. *Matthews*, 2 Russ. 62; *Kennedy* v. *Lee*, 3 Mer. 448.

(*f*) *Phillips* v. *Atkinson*, 2 Bro. C. C. 272.

implied power to entrust this to others, so as to bind the representatives of his former partners (*a*). For a like reason, an appointment of a judicial factor will easily be obtained by a partner against the representatives of his late copartner by succession or in bankruptcy (*b*). Even where the partners on dissolution have agreed to appoint a stranger to wind up the concern, and to refrain from interference themselves, this does not always preclude the appointment of a judicial factor. Thus, when an agreement of this kind had been made and had been partially carried out, but on the death of one of the partners disputes arose between his representatives and the surviving partner who sought to interfere in the management, the Court of Chancery appointed a receiver on a bill filed by the executors of the deceased partners (*c*).

Special instances.

When, on a dissolution, no extrajudicial arrangement between the *quondam* partners for winding up the concern could be agreed upon, and there was no provision on the subject in the contract of copartnery, the Court, on the application of one partner with consent of the others, appointed a judicial factor (*d*). And in one very special case of a joint adventure, a judicial factor was appointed of consent of both the adventurers, with the unusual powers of taking all steps necessary for the protection of the interests of the adventure, and either to wind up and sell the property or to carry on the business. This case, however, cannot be taken as a precedent (*e*). The partner of a dissolved firm, while in prison on a charge of forgery, of which he was afterwards convicted, granted a trust-assignation and a factory in favour of a certain party, for the purpose of collecting the debts and winding up the concern. The Court superseded the appointment, but nominated the same party to be judicial factor (*f*).

Powers of judicial factor in private firms.

As to the powers of judicial factors appointed on unincorporated associations, the following cases may be noticed: Where a judicial factor had been appointed on the estates of a solvent mercantile company, after the death of the last partner, to manage and wind

(*a*) *Dixon* v. *Dixon*, 1831, 10 S. 178; *Fullarton* v. *Dixon*, 1834, 12 S. 750.

(*b*) *Freeland* v. *Stansfeld*, 2 Sm. and G. 479; *Candler* v. *Candler*, Jac. 225; *Fraser* v. *Kershaw*, 2 K. and J. 496.

(*c*) *Davis* v. *Amer*, 3 Drew. 64.

(*d*) *Abercrombie*, 1857, Thoms on Jud. Fact. 42.

(*e*) *Bell*, 1857, 19 D. 704.

(*f*) *Marshall* v. *Anderson*, 1841, 3 D. 989.

up the concern, and all parties concurred in the expediency of selling the real property, but some opposed a sale by the factor, the Court held that as the real property must be viewed as part of the company funds, the factor was entitled to make up titles to and sell it; and authority was granted accordingly (*a*). When a judicial factor on the estate of a dissolved company brings an action for a debt due the company, and is met by the defence of set-off, he is entitled, on obtaining authority from the surviving partner, to plead recompensation against the counter claims of the defenders, in respect of a sum due by them to the surviving partner individually, though incurred after dissolution of the partnership (*b*).

Appointment of partner.

It is not unusual in England, when a receiver is appointed, to give the appointment to a partner actually carrying on the business, provided he is not chargeable with misconduct. He, however, receives no salary (*c*).

Public companies.

In the case of joint-stock companies managed by directors, it is more difficult to obtain the appointment of a judicial factor than in the case of private partnerships. If the application is made at the instance of a minority, it is always very doubtful whether they have good cause of complaint, seeing the majority are satisfied with the management provided by the company's constitution; and if at the instance of a majority, such an extraordinary exercise of the equitable powers of the Court seems unnecessary, since the majority have generally the power of remedying the evils complained of by changing the management, and any immediate improprieties may be checked by interdict. When the company is incorporated, the appointment of a judicial factor is liable to this objection, that it amounts to a withdrawal of the management from the governing body to which the Legislature or the Crown had entrusted it (*d*). The case is different where the company has been dissolved, and the application is made for the purposes of winding up (*e*). When an application of this kind is made, all the partners or shareholders must be called (*f*).

(*a*) *Fullarton* v. *Dixon*, 1834, 12 S. 750.

(*b*) *Thomson* v. *Stephenson*, 1855, 17 D. 739. See also *Rae* v. *Candlemakers of Edinburgh*, 1858, 20 D. 461.

(*c*) *Wilson* v. *Greenwood*, 1 Swanst. 471. See Lindley, p. 856.

(*d*) *Maxton* v. *Muir*, 1845, 7 D. 1006.

(*e*) Opinions of judges in same case; and *Southern Bank of Scotland*, 1849, 11 D. 1494.

(*f*) Last cases.

Statutory provisions.

By the Companies Clauses Act, 8 and 9 Vict. c. 17, ss. 56 and 57, and 20 and 21 Vict. c. 56, s. 3, the courts are specially empowered to appoint judicial factors or receivers, to collect the tolls or other sums liable for the principal or interest of certain mortgages or bonds granted by companies falling under the provisions of the statute. Similar provisions also occur in some previous private acts. It has been decided, that these special enactments do not take away the original powers of the Court of Session or the Court of Chancery to appoint such officials (*a*). The mortgagee, it appears, may elect between the statutory and the ordinary appointment (*b*).

(*a*) *Glasgow and Garnkirk Ra. Co.*, 1850, 12 D. 944 and 1014; *Maxton* v. *Muir*, 1845, 7 D. 1006; *Dremry* v. *Barnes*, 3 Russ. 94; *Knapp* v. *Williams*, 4 Ves. 429; *Dumville* v. *Ashbrooke*, 3 Russ. 98.

(*b*) *Fripp* v. *Chard Ra. Co.*, 22 Law Jour. Ch. 1084. See, as to these appointments, *Baird* v. *Caled. Ra. Co.*, 1850, 13 D. 36 and 795; *Primrose* v. *Caled. Ra. Co.*, 1851, 13 D. 1214; *Wishaw Ra. Co.* v. *Caled. Ra. Co.*, 1851, 13 D. 464; *Glasg. and Barrhead Ra. Co.* v. *Caled. Ra. Co.*, 1850, 12 D. 1014.

CHAPTER IX.

CRIMINAL AND *QUASI* CRIMINAL PROCEDURE.

General observations.

By the law of Scotland, though criminal prosecutions are generally raised at the instance of the Lord Advocate as public prosecutor, it is also competent to the private party who has sustained the wrong to prosecute criminally *ad vindictam publicam;* but inasmuch as such a power is very liable to abuse, the law has made certain provisions which have generally been found sufficient to prevent its being exercised in a reckless or malicious manner (*a*). One of the most important of these is, that the unjust or calumnious prosecutor lays himself open to an action of damages at the instance of the accused; and by certain statutes, the Court of Justiciary is empowered, on the accused being acquitted, to subject the prosecutor in due reparation, which may be recovered by summary process. It seems even to be competent to raise a counter libel for calumny, and remit it to the same assize by which the accused had been tried (*b*).

Criminal proceedings not generally competent to companies.

Now, it is obvious that the efficiency of such checks on reckless or malicious prosecution depends entirely on the accused being made aware of who his individual accuser or accusers are; and consequently, before a private prosecution can proceed, it is required not only that the name of the individual or individuals prosecuting appear in the instance, but that they appear personally at the bar. For this reason, therefore, if for no other, such prosecutions cannot be raised at the instance of firms or companies prosecuting in the descriptive or social name. It may be said, indeed, that this reason would fail when the prosecution proceeds in the social name,

(*a*) Hume's Criminal Law ii. p. 119. (*b*) *Ibid.* pp. 127–8.

which includes that of individuals; but it must be remembered that the social name often includes those of persons who are no longer partners. The difficulty would perhaps be got over if the prosecution were to be raised in the names of all the partners or members of the company, and if they all appeared at the bar (*a*). In the case of a corporation aggregate, it was held that a private prosecution might proceed in the corporate name, coupled with that of a factor or attorney specially appointed for the purpose, who appeared at the bar as representing the corporation. Yet in that case the factor not only produced his general commission of factory, but an extract from the company books, under the hand of the secretary, of a special order to him to carry on the process, and a formal mandate to prosecute under the corporate seal (*b*).

Distinction between companies and corporations.

An opinion has been hazarded, to the effect that the same kind of procedure would be competent at the instance of an unincorporated association (*c*); but here the characteristic distinctions between corporations and common law companies appear to have been overlooked,—a distinction which greatly affects even civil procedure. 1*st*, The will of a corporation is ascertained in accordance with the forms appointed for that purpose by public authority, so that there is little danger of its name being used by unauthorized persons; whereas the same securities do not exist that the name of a mere firm or unincorporated association may not be employed by a minority of the partners, or even by strangers, for the purpose of a groundless or malicious prosecution. 2*d*, A corporation is a continuous entity, possessing corporate property, and not dissolvable at the will of its members, so that in the event of his being wronged, the accused can be at no loss against whom and in what manner to obtain redress; whereas the *quasi* person of a common law company or firm may be dissolved at any time, leaving the accused to find his remedy as best he may against such as he can prove to have been its former members (*d*). It would therefore seem, that while corporations may, by observing certain formalities, prosecute criminally in the corporate name, this is incompetent

(*a*) *Renfrewshire Banking Co.* v. *M'Kellar*, 1816, Hume's Crim. Law ii. 119; *Aitken* v. *Rennie*, 1810, 16 F. C. 78.

(*b*) *York Buildings Co.* v. *Mathie*, 1727, Hume's Crim. Law ii. 268.

(*c*) Hume's Criminal Law ii. 268.

(*d*) See *Arbuckle* v. *Taylor*, 1815, 3 Dow 160.

to unincorporated associations, unless all the members appear individually in the instance and attend at the trial.

It has sometimes been given as a reason why unincorporated associations could not prosecute criminally, that they are not susceptible of the sense of injury (*a*). As to this, it may be said that a desire to revenge wrongs, real or supposed, is not a motive for instituting a criminal prosecution, which ought to be recognised by the law in civilised times; and it is to be hoped that the tribunals of this country would discountenance any other motives than those of reforming the criminal or securing the safety of the public. But apart from such considerations, it is very evident that in denying the right of criminal prosecution to unincorporated associations, the law has recognised no such principle as that suggested, seeing the right in question is competent to corporations, whose sense of injury cannot be supposed to have been implanted or preternaturally quickened by the intervention of a charter or special act.

Criminal procedure against associations is incompetent.

No criminal or *quasi* criminal proceedings can be taken against firms, companies, or other associations of individuals, whether corporate or unincorporate; the individuals only by whom the wrong is alleged to have been done can be so prosecuted. The reason of this is, that artificial persons cannot be conceived of as possessing moral attributes; and that to punish as criminals the individual members of an association for its corporate acts, unless where they were individually tried and convicted, would in many cases involve persons in the consequence of crimes of which they were morally innocent (*b*).

STATUTORY PENALTIES.

Modes of enforcing.

When companies are formed by special act for carrying on undertakings of a public nature, such as railways, canals, and the like, certain police regulations are often made by the Legislature for the protection of their interests and those of the public; and the company are themselves frequently empowered to make bye-laws for the same purpose. When this is the case, summary and convenient modes of procedure are provided by the Legislature for

(*a*) Hume's Criminal Law ii. 119.

(*b*) *Miles* v. *Finlay and Co.*, 1830, 9 S. 18.

the enforcement of such regulations or bye-laws before the sher or justices of the peace.

8 and 9 Vict. c. 17.

The provisions of the Companies Clauses Consolidation (Sco land) Act on these matters are as follows:—The company a required to publish on a board, set up in a conspicuous part of the principal place of business, short particulars of the offences for whic penalties are imposed by their special acts or bye-laws on the public and unless this has been done and kept legible, the penalties cann be recovered. When the penalties apply to offences committed in pa ticular localities, they must be posted in such localities (sec. 147) (*a* Penalties are imposed on such as deface or obliterate the boar (sec. 148). A summary mode of recovering penalties is provide before the sheriff or two justices (sec. 149); and if not immediatel paid, they are levied by poinding and sale (sec. 150). Offender when convicted may be detained by order of the sheriff or justice until return is made to the warrant of poinding and sale, unles they can find security by recognizance or otherwise for appearanc on such return; and if, before issuing the warrant of poinding an sale, it appear that sufficient goods whereon to levy cannot be foun within the jurisdiction, or if the warrant, when issued, prove in operative, the offenders may be imprisoned for three months unles the penalties be sooner paid (sec. 151). When penalties or other sum have been levied by poinding and sale, the surplus must be paid o demand to the party whose goods have been seized (sec. 152) (*b*).

Defects in form.

No poinding and sale, nor summons, conviction, warrant, o other relative proceedings, are deemed unlawful from want of form but, at the same time, such defect or irregularity may ground a action of damages in the Sheriff Court (sec. 153).

Disposal of penalties, and appeal.

When the disposal of penalties is not otherwise provided for, on half may be awarded to the informer, and the residue to the kirk-session (sec. 154). Penalties must be sued for within six month (sec. 155). Damages may be claimed in addition to penalties (sec 156). Witnesses refusing to appear or to be examined on oath forfeit a sum not exceeding £5 (sec. 157). Offenders whose name and residences are unknown, may be summarily apprehended and

(*a*) See Bye-Laws, *supra*.

(*b*) See as to application of the 'Summary Procedure (Scotland) Act, 1864,' to cases of this kind, *Craig* v. *Great North of Scotland Ra. Co.*, 20 Nov. 1865, High Court of Justiciary.

proceeded against (sec. 158). The Sheriff proceeds summarily in all cases under the Act without abiding the course of the roll, and without written pleadings, or reducing the evidence to writing, unless he see fit; and proceedings so taken are not liable to review by suspension, advocation, or reduction on any ground whatever (sec. 159). A form of conviction is given in Schedule G. No proceedings under the general or special acts can be quashed for want of form, or removed into a superior court by suspension or otherwise (sec. 161). But when the proceedings have been in writing, an appeal lies to the Sheriff from his substitute, who may hear the parties *viva voce*, subject, however, to no further review (sec. 162). Appeal also lies from the Justices to the Quarter Sessions, if made within four months, and on ten days' notice in writing to the opposite party, provided the appellant enter into recognisances with two sufficient sureties, to prosecute the appeal, and abide the judgment (sec. 163). The Quarter Sessions may hear and determine the appeal at once, or may adjourn it to the following sessions, and may confirm, quash, or mitigate the sentence, dealing with sums already levied, costs, and damages as they see fit (sec. 164).

Damages against company.

Provisions are also made by the same statute for the more effectual and speedy recovery of damages or expenses exigible from the company by reason of any irregularities, trespasses, or other wrongful proceedings done in the exercise of the statutory powers, and not otherwise provided for. These provisions are as follows:—

Payment into Court.

The company, or any persons acting on their behalf, who have rendered themselves liable to prosecution for irregularities, trespasses, or other wrongful proceedings under any of the provisions of the general or special acts, may prevent action being raised against them by tendering sufficient amends; and if action has already been raised, they may before the record is closed pay into Court such sum of money as they shall think fit, by leave of the judges, and the effect of this will be the same as in ordinary cases where this course is adopted (sec. 143).

How ascertained and recovered.

Where provision is not otherwise made for ascertainment of damages, costs, or expenses accruing under the Act, they are determined by the Sheriff; and if not paid within seven days after demand, they may be recovered under warrant of the Sheriff, by

poinding and sale of the goods of the company or other party lia (sec. 144). In default of sufficient company goods on which levy the amount decerned for, it may be recovered by poindi and sale of the goods of the treasurer, provided that it does exceed £20, and that he has been served with a written notice a demand for the amount seven days previously. The treasure entitled to indemnity against the company for payments so ma or levied, and he may make it good either by retention or acti (sec. 145).

Jurisdiction. When questions of damages, expenses, or charges fall to determined by the Sheriff or two Justices, the defender may summoned on the warrant of the Sheriff or any Justice; and dec or award pronounced by the Sheriff or two Justices *in foro* or absence is final (sec. 146).

25 and 26 Vict. c. 89. The Companies Clauses Act of 1862, though it refers mer to companies incorporated by registration, contains the followi provisions for the summary recovery of penalties for offences *in socios*:—

All offences involving penalties may be prosecuted summar in Scotland, before two or more Justices, or the Sheriff or Sher depute of the county, in manner directed by 17 and 18 Vict. 104, or any Act amending the same (sec. 65), not being offen described as felonies or misdemeanours. The Sheriff or Justi may direct the whole or part of the penalties to be applied in p ment of costs or in rewarding informers; but in default of su direction they are paid into Exchequer (sec. 66).

CHAPTER X.

ARBITRATION.

PRIVATE FIRMS AND COMMON LAW COMPANIES.

General observations.

THOUGH individual partners have no implied powers to refer to arbitration matters in which their companies are concerned; and though it is even doubtful whether such a power may on mere implication be competently exercised by majorities so as to bind dissenting members, it is not unusual to confer it by the instrument of formation on majorities, officials, or managing partners. When this has been done, the powers so conferred will bind the company, provided they are exercised by the persons and in accordance with the provisions stipulated; nor is it probable that the courts will in a question with third parties permit the company to take advantage of informalities, to escape from obligations so created. It would be *jus tertii* for a third party to found on such informalities.

Clauses of submission in contract of copartnery.

It is also a common practice to introduce into the articles of association or deed of copartnery, clauses whereby disputes arising *inter socios* or between the company and its members or their representatives are required to be referred to the arbitration of certain specified persons. Such stipulations, when properly expressed, are binding, and will exclude to a great extent the jurisdiction of the ordinary tribunals (*a*). To be effectual, however, they must be conceived in very explicit terms; and they must contain a specific reference to persons named. Thus a clause in a contract of copartnery, referring all future disputes to the chairman, etc., of the Glasgow Chamber of Commerce for the time, was held to be

(*a*) *Cooper* v. *Bertram, Shotts Friendly Society*, 1825, 3 S. 454; *Manson* v. *Doull*, 1840, 2 D. 1015.

ineffectual,—the reference not being to an individual, and the reference as well as the point to be decided being indefinite at the date of the contract (*a*). In like manner, an obligation to refer to two neutral persons was held to be insufficient to bar action (*b*).

Rules as to arbitration.

Arbitration between companies and the public, or their own partners, are in general regulated by the same rules as apply in cases of ordinary submissions, and will be found in any work on arbitration (*c*). There are, however, some peculiarities to which we shall briefly advert. An arbiter is in general disqualified by being a partner (*d*). It is no objection, however, to an arbiter, that as partner of a company he is creditor to a small extent of an insolvent party, in whose favour decree is pronounced (*e*). It was found to be no objection to a decree-arbitral against a company, that it was pronounced after the sequestration and death of the sole partner, notice having been given to the trustee and representatives, who declined to appear (*f*). It does not seem ever to have been judicially settled, but there can be no doubt that a submission may be prorogated by the acts of one active and known partner, such power plainly falling within the implied agency. In a judicial reference of an action against a partner for payment of two calls of stock, it was held that as the referee had decerned for payment of both calls at one time, whereas, by the statute constituting the company, an interval of one month should elapse, the decree was invalid, except as to the first call, and was in other respects conditional and inconclusive (*g*). It was held that a submission in a contract of copartnery, of any difference which shall arise between the partners themselves, did not apply to an action by one partner against the other for illegal, fraudulent, and malicious violations of the con-

(*a*) *Buchanan* v. *Muirhead*, 1799, M. 14593.

(*b*) *Milne* v. *Magistrates of Edin.*, 1770, 2 Pat. App. 209; *Hendry's Trs.* v. *Renton*, 1851, 13 D. 1001. See *Hunter* v. *Cochrane*, 1831, 5 W. and S. 639; aff. 9 S. 477.

(*c*) See Bell on Arbitration 109, 370 sqq.

(*d*) *Tennent* v. *Macdonald*, 1836, 14 S. 976; *M'Kenzie* v. *Clark*, 1828, 7 S. 215.

(*e*) *M'Kessock* v. *Drew*, 1822, 2 S. 11.

(*f*) *Hamilton* v. *M'Gilp*, 1826, 5 S. 129. See *Grant* v. *Girdwood and Co.*, 1820, 20 F. C. 156.

(*g*) *Edin. Oil Gas Co.* v. *Clyne's Trs.*, 1832, 10 S. 723, alt. 1835, 2 S. and M'L. 243. See, as to this, *North British Ra. Co.* v. *Barr*, 1855, 18 D. 102; *Finlay and Co.* v. *Campbell*, 1834, 12 S. 792.

tract, such as attempting to destroy the partnership by creating a fictitious bankruptcy (*a*). The clerk to a submission between two partners raised an action against both for his account, and arrested the funds of one of them. A new submission was entered into between the clerk and that partner, and the amount claimed was consigned in the hands of the referees. They having differed in opinion, and declined to act, a multiplepoinding raised by the clerk in their name for disposal of the consigned fund was held competent, though the other partner had not been made a party (*b*).

STATUTORY ARBITRATION.

Legislative enactments.

We have already seen that it is a matter of considerable doubt, whether at common law, and unless specially provided in their instruments of formation, associations for the purposes of gain, whether corporate or unincorporate, have the power of referring disputed questions to arbitration, so as to bind dissenting members. However this may be, the Legislature has by divers acts conferred powers to this effect upon companies incorporated or formed under certain general enactments, and has laid down certain rules by which such statutory arbitrations are to be regulated. It will be necessary to devote some space to the examination of these provisions.

The Lands Clauses Consolidation Acts, and the Railway Clauses Consolidation Acts, provide that, in certain circumstances, the value of lands taken under the powers of a company's special act, and the loss or damage consequent on the company's operations, shall be assessed by arbitration; and the mode in which such arbitrations are to be conducted is specially laid down and regulated. These provisions are declared applicable to railways formed under the Railway Construction Facilities Act, 1864 (sec. 51 of that Act). It is unnecessary to notice these provisions in this place, as they have been already fully examined and explained.

27 and 28 Vict. c. 121.

By the Companies Clauses Consolidation (Scotland) Act, 1845, it is provided that where any dispute directed by that or the special act, or any act incorporated therewith, to be settled by arbitration, shall have arisen, then, unless both parties concur in the appoint-

8 and 9 Vict. c. 17.

(*a*) *Lauder* v. *Wingate*, 1852, 14 D. 633, and 24 Jur. 321.

(*b*) *M'Farlane* v. *Black*, 1842, 4 D. 1459.

ment of a single arbitrator, each party shall, on the written request of the other, nominate an arbitrator by writing under his hand. The appointments so made cannot be revoked except of consent, nor does death operate as a revocation. If for fourteen days after the dispute has arisen, and after the request to name an arbitrator has been made by one party or the other, this last party fails to do so, the party making the request may appoint the person whom he has named to act on behalf of both, and his award is final (sec. 131). If, before the matters referred have been determined, an arbitrator die, become incapable, or refuse or neglect for seven days to act, the party appointing him may nominate another to supply his place; and if for seven days after written notice to make a new appointment, he fail to do so, the other arbitrator may proceed *ex parte*. Substituted arbitrators have the same powers as those in whose place they came (sec. 132). The two arbitrators must, before proceeding to act, appoint an umpire (oversman) by writing under their hands to decide where they differ. If the umpire die, refuse, or for seven days neglect to act, the arbitrators must immediately nominate another. The decision of the umpire is final (sec. 133). On failure of the arbitrators to appoint an umpire, the Lord Ordinary is empowered to do so on the application of either party (sec. 134). The arbitrators or umpire may examine the parties or their witnesses on oath, and may order production of documents, or grant diligence for this purpose, or for citing witnesses. Letters in supplement, etc., are issued by the Lord Ordinary where necessary (sec. 135). Unless otherwise provided, the costs of the arbitration are in the discretion of the arbitrators or umpire, as the case may be (sec. 136).

22 and 23 Vict. c. 59.

By the Railway Companies Arbitration Act, 1859, and which extends over the United Kingdom, certain important provisions are made for the settlement of matters in which railway companies are mutually concerned. It provides as follows:—Any two or more such 'companies,' under which are included the owners or lessees of a line of railway worked by steam power, and all contractors working such lines, may from time to time, by writings under their common seals, refer to arbitration any existing or future differences, and all matters in which they are mutually interested, and which they might lawfully dispose of by

agreement between themselves, and may delegate to the referees such powers to determine the terms of any contract made between the companies as their directors might delegate to committees of their own number (sec. 2). The reference may from time to time be added to, altered, or revoked, by a joint writing under seal (sec. 3); but subject to such alteration or revocation, its terms are binding, and must be carried into effect (sec. 4). Where the companies agree, the reference may be made to a single arbitrator; but in default of such agreement, there must be as many arbiters as there are companies (secs. 5, 6). Where there are more arbitrators than one, each company appoints an arbitrator by writing under its common seal, and must give notice to the other companies (sec. 7). If, after such notice, any company fail for fourteen days to appoint an arbiter, the Board of Trade may do so on the application of any of the other companies (sec. 8). If, before final award, any of the arbitrators die, become incapable or unfit, or for seven consecutive days fails to act, the company that appointed him must appoint another; and on their failure to do so, the Board of Trade will as before make the appointment (secs. 9, 10). Arbitrators appointed by the Board of Trade are deemed to have been appointed by the companies who failed to do so (secs. 8, 10). Appointments of arbitrators once made cannot be revoked, except on the written consent of the other companies (sec. 11). The arbitrators, before entering on the business of the reference, must appoint a duly qualified umpire; and on their failure to do so for seven days, the Board of Trade, on application, will make the appointment (secs. 12, 13). On the death, supervening incapacity, or failure for seven days of the umpire to act, another must be named by the arbitrators; and if they fail to do so for seven days, it will be done by the Board of Trade (secs. 14, 15). Substituted arbitrators and umpires have the same power as their predecessors (sec. 16). If within the agreed upon time, or otherwise if within thirty days, the arbitrators do not agree on their award, the reference devolves on the umpire (sec. 17). The arbitrators or umpire, as the case may be, are empowered to call for documents and to examine witnesses on oath; and to grant diligence for the recovery of documents or evidence, and for citing of witnesses. If required, the Lord Ordinary will issue letters in supplement or other writs in support of the diligence (sec.

18). Unless otherwise arranged, the arbitrators or umpire may proceed in the business of the reference as they think fit; and after giving due notice, even in absence of the parties or any of them (secs. 19, 20). Instead of a single decree-arbitral exhaustive of the reference, the arbitrators or umpire may make separate or consecutive awards; and in such a case, each award, so far as it goes, will be binding, even though the whole matters referred should not ultimately be determined (sec. 21). To render the award or awards valid, they must be duly signed and ready to be delivered within thirty days from the date of the reference, unless some other time has been specified. The umpire, however, unless the contrary has been arranged, may, by written prorogation, extend the period within which his award ought to be made (secs. 22, 23). Awards cannot be set aside for informality, but must be fully carried out; and the superior courts of law and equity throughout the United Kingdom are required to give every aid by distress infinite on the property of the companies or otherwise for this purpose (secs. 24, 25, 26). Unless otherwise agreed on by the parties, or determined in the award, the costs of the arbitration and award are borne equally; and in other respects each company bears its own expenses (secs. 27, 28).

27 and 28 Vict. c. 121.

The provisions of the Act we have now been considering are incorporated in the Railway Construction Facilities Act, 1864 (schedule attached to the Act).

25 and 26 Vict. c. 89.

By the Companies Act of 1862, any company registered under its provisions may, by writing under their common seal, agree to refer, and may refer to arbitration in accordance with the Railway Companies Arbitration Act, any existing or future difference, question, or matter whatsoever in dispute between themselves and any other company or person; and such companies as are parties to the reference may delegate to the referees power to settle any terms or to determine any matter capable of being settled or determined by the companies themselves, or by their directors or other managers (secs. 72, 73).

Observations.

It will be observed that by this last enactment the provisions of the Railway Companies Arbitration Act receive a much wider application than that originally contemplated. Previously they had been applicable to no other than companies or others working lines

of railway on which steam power was employed; whereas they are, since 1862, rendered available in all questions whatever arising between registered companies on the one hand, and companies or persons of every description on the other. It must be noticed, however, that the provisions of the Railway Companies Arbitration Act, whether taken in their original or more extended sphere of operation, are in no case compulsatory. The Act is merely enabling, and binds no one who has not consented to a reference under its provisions.

CHAPTER XI.

EVIDENCE (*a*).

General observations.

THE kind of evidence admissible in questions between companies, their members, and the public, as well as its import and legal effect, must be ascertained by referring to the rules and principles of evidence as these are generally applicable. At the same time, it must be observed, that from the peculiarities of the partnership relation, the common principles and rules of evidence frequently require a special adaptation when it forms the subject to which they are applied. Already in the course of this work we have, under the heads Evidence of Partnership (*b*), Prescription (*c*), Reference to Oath (*d*), and Admissions (*e*), somewhat fully examined certain cases in which this special adaptation is exemplified; and when treating of Bankruptcy, Dissolution, and Winding-up, we shall have occasion to return to the same subject. It has, however, been thought advisable to bring together within the compass of the present chapter some of the more important principles and rules which the characteristic incidents of the partnership relation bring into operation.

Evidence of partnership.

Evidence of Partnership.—Generally, the declarations or depositions of the alleged partners of another cannot be used against the latter to establish that he is a partner (*f*); but they may sometimes be admitted as part of the *res gestæ*, their effect being left to the jury (*g*). A witness cannot be asked whether he believed that two or more persons were partners, but he may be asked as to facts showing that they were so (*h*). In an action by a railway com-

(*a*) See Dickson on Evidence.
(*b*) P. 64.
(*c*) P. 279.
(*d*) P. 529.
(*e*) P. 532.
(*f*) *Belch*, 1806, 2 Bell's Com. 399, n. 4; *Smith* v. *Puller*, 1820, 2 Mur. 342.
(*g*) Same case.
(*h*) *Chatto and Co.* v. *Pyper*, 1827, 4 Mur. 354.

pany for payment of calls, the defenders objected that their name had been improperly entered on the company's books, and the authenticity of the registers was challenged. At the trial, two books, said to be registers, were tendered by the company in evidence, and admitted by the judge, though their admissibility was objected to because it had not yet been determined whether they were registers or not, and also because they were not kept and authenticated in terms of the Act. It was held on a bill of exceptions, that though statutory registers were conclusive evidence, the fact of membership might be otherwise established, and that the books, such as they were, were evidence for the jury (*a*). Allegations of partnership are different from allegations of trust, and may therefore be proved *prout de jure*. Thus, an allegation that money deposited in bank in name of a person deceased, belonged to a partnership of which the defender and the deceased were partners, was held not to be an allegation of trust, so as to be restricted to proof by writ or oath (*b*). See, upon this subject generally, Book I. Chapter VIII.

Shares in ships.

Where certain shares of a ship were registered in the name of a party individually, it was held incompetent to prove that they were the property of a company of which he was a partner (*c*); and when, from the certificate of registry, a party appeared to be the owner of a ship, it was held incompetent for him to adduce evidence to contradict the certificate, and show that he was not the real owner (*d*).

Extent of partner's share.

Extent of Partner's Share (*e*).—Entries in the company books have been held as conclusive evidence on this matter (*f*); but private books kept by a partner, and which it was not proved had been seen by the other partner, were not admitted as evidence against the representatives of the latter, in an accounting at the instance of the executrix of the former (*g*). At the same time, a partner is presumed to be cognizant of the contents of the books

(*a*) *Caledonian and Dumbarton Ra. Co.* v. *Lockhart*, 1854, 17 D. 25; but see 17 D. 917.

(*b*) *General Assembly of Baptist Churches* v. *Taylor*, 1841, 3 D. 1030.

(*c*) *Ord* v. *Barton*, 1846, 8 D. 1011.

(*d*) *Morton* v. *Black*, 1843, 5 D. 411.

(*e*) See, as to this, p. 377 *et seq.*

(*f*) *Blair* v. *Russell*, 1828, 6 S. 836, and 8 S. 72.

(*g*) *Smith* v. *Logan*, 1826, 5 S. 29; aff. 1830, 4 W. and S. 47.

kept as company books (*a*); and in an action *inter socios*, a valuation of the company stock by one of the partners was admitted (*b*).

Minutes of meetings.

Minutes of Meetings.—When the company is incorporated or formed under a statute, the prescribed rules contained in the instrument of incorporation, or in the general Acts to which it refers, must be regarded as regulating the mode of authenticating such documents (*c*). The minutes of the meetings of provisional committees, or of promoters, are not the writ of any member who does not sign them (*d*). And the provisions of the Companies Clauses Act, 1845, as to the keeping of minutes by the directors, do not apply to the minutes of provisional directors before incorporation (*e*). Generally, it may be said that where the resolutions of a meeting have been reduced to writing, it is incompetent to ask a witness what they were (*f*). In an action on a contract, between provisional directors and road trustees, the Court refused to admit evidence by letters to modify the terms of the contract (*g*). But in a question as to the intimation of an assignation of shares alleged to have been made at a meeting of shareholders whose proceedings were recorded in a minute, the Court allowed part of the *res gestæ* which were omitted in the minute, and denied to have taken place, to be proved parole (*h*); and in an action of damages for non-implement of a contract said to have been embodied in a minute of the directors, but not signed, it was held competent to exhibit to the company's secretary the draft of the minute prepared by him, and to ask him if it contained a correct account of the *res gestæ* (*i*).

Act 1845.

By the Companies Clauses Consolidation Act of 1845, it is required that all minutes of meetings shall be entered in books kept for the purpose, and shall be signed by the chairman; and when

(*a*) *Kenney* v. *Walker*, 1836, 14 S. 803.

(*b*) *Ewing* v. *Crichton*, 1827, 4 Mur. 184.

(*c*) See *Whitehaven and Furness Ra. Co.* v. *Bain*, 1850, 12 D. 829, aff. 1850, 7 Bell's App. 79; *Great Northern Ra. Co.* v. *Inglis*, 1851, 13 D. 1315, aff. 1852, 24 Jur. 434, 1 Macq. 112. See Companies Clauses Act, secs. 10, 11, 101.

(*d*) *Johnston* v. *Scott, etc.*, 1860, 22 D. 393. See, as to this, p. 75, 'Promoters.'

(*e*) *Wilson* v. *Glasgow and S.-W. Ra. Co.*, 1851, 14 D. 1.

(*f*) *Ivison* v. *Edinburgh Silk Co.*, 1846, 9 D. 1039. See also last case.

(*g*) *Thomson* v. *Monklands Ra. Co.*, 1852, 2 Stu. 50.

(*h*) *Hill* v. *Lindsay*, 1847, 10 D. 78.

(*i*) *Wilson* v. *Glasgow and S.-W. Ra. Co.*, 1851, 14 D. 1.

this has been done, they are legal and conclusive evidence of what they contain until the contrary is proved (*a*).

Act 1862.

By the Companies Act of 1862, it is provided that minutes of all resolutions, and proceedings of general meetings, and of the directors or managers, must be duly entered in books kept for the purpose. These minutes, if purporting to be signed by the chairman of the meeting or of the next subsequent meeting, are evidence in legal proceedings. Until the contrary is proved, all general meetings, or meetings of officials of which minutes have been so made, are presumed to have been duly held, and their resolutions to have been duly passed; and all appointments of officials made at them, and all acts done by such officials, are valid, though some defect may afterwards be discovered in their appointments or qualifications (*b*).

Minutes of unincorporated associations.

The minutes of unincorporated associations enjoy none of the privileges of those of corporate bodies. In a question *inter socios*, it is probable that any rules as to authentication laid down in the instruments of formation will be held obligatory, so that when they have not been adhered to, shareholders will not be held bound. But the question is very different when it arises with the public, who, knowing nothing of such private rules, cannot be supposed to be bound by them (*c*). In a discussion on the relevancy and competency of an action by the directors of an unincorporated company, the pursuers were allowed to found upon and read in support of the action, the minutes of meetings, and reports made by them to their shareholders, though these were neither admitted nor proved (*d*).

Company books.

Company Books.—Evidence of the handwriting of the secretary of a private company is not sufficient to authenticate the books; they ought to be authenticated by the secretary's evidence (*e*). The mode in which the books of an incorporated association are to be authenticated is generally fixed by the incorporating instrument. Partners of private firms are presumed to be cognizant of the contents of the company books, and are accordingly bound by them (*f*).

(*a*) 8 and 9 Vict. c. 17, s. 101.

(*b*) 25 and 26 Vict. c. 89, s. 67.

(*c*) See *Ivison* v. *Edin. Silk Co.*, 1846, 9 D. 1039; *Hill* v. *Lindsay*, 1847, 10 D. 78; *Inglis* v. *Cunningham*, 1826, 2 Mur. 77; *Mansfield* v. *Maxwell*, 1835, 13 S. 721.

(*d*) *West of Scotland Malleable Iron Co.* v. *Buchanan*, 1855, 17 D. 461. See Dickson on Evidence, s. 1169.

(*e*) *Auchmutie* v. *Ferguson*, 1817, 1 Mur. 205 and 208.

(*f*) *Kenney* v. *Walker*, 1836, 14 S. 803.

Entries in books kept by a bank agent for the bank have been held t be his writ, and good evidence against him in a question with a priva creditor (*a*). An entry in a pass-book duly initialed by the office of a bank to the credit of a depositor who had a current account, merely *prima facie* evidence against the bank, and may be rebutte by evidence *prout de jure* (*b*). In an action for the price of goo sold, it was held that, after a proof and production of partial excerp from the pursuer's books, it was incompetent to refer to these excerp as establishing payment (*c*). A general order for inspection of th books of a mercantile company has been refused (*d*).

Questions of privilege.

In an action of damages for non-delivery of railway shares, was held that, though the company were not parties to the actio the secretary was bound to exhibit to the commissioner the compan books, so that he might judge whether they instructed the price o not, under reservation of any special objections to their inspectio arising from the nature of the transaction, which the secretar might state (*e*). When a law-agent who had bound up the scrolls o all deeds prepared by him, though affecting different clients, in on volume, declined to deliver up this volume, but allowed excerpts t be taken by the commissioner, and brought the original scroll wit him to the trial for collation with the excerpts, it was held that th excerpts might be put in evidence, and that it was not necessary t lodge the original scroll eight days before the trial (*f*).

Excerpts.

Excerpts from the books of a mercantile company, defende in an action made under a commission and diligence, and dul authenticated, may be produced at a trial, and it is not necessar to produce the books themselves (*g*). But, on the other hand, i has been held that the register and minute-book of a railway com pany must in an action for calls against a shareholder be produce eight days before the trial, and that excerpts produced before tha time which were not certified were not sufficient (*h*). Even whe

(*a*) *Anderson* v. *Wright*, 1840, 15 F. C. 1187.

(*b*) *Rhind* v. *Commercial Bank*, 1860, 3 Macq. 643, 22 D. (H. of L.) 2, reversing 19 D. 519.

(*c*) *Ralston, Goodwin, and Co.* v. *M'Lean*, 1857, 19 D. 878.

(*d*) *Houldsworth* v. *Walker*, 1819, 2 Mur. 85.

(*e*) *Graham* v. *Sprot*, 1847, 9 D 545.

(*f*) *Wilson* v. *Glas. and S.-W. Ra Co.*, 1851, 14 D. 1.

(*g*) *Thom* v. *North British Bank* 1850, 13 D. 134.

(*h*) *Whitehaven and Furness Ra Co.* v. *Macfadyen*, 1849, 11 D. 846 *Carrick* v. *Saunders*, 1850, 12 D. 922

the excerpts had been made at the sight of a commission, they were held inadmissible, and not sufficient to entitle the company to make the books from which they had been taken evidence, their not having been produced in due time, and no notice having been given of their intended production (*a*).

Competency of books as evidence.

A book tendered in evidence at a trial, and proved to be the writ of the company by the evidence of their law-agent, who deponed that he received it from them, but knew nothing of its contents, was allowed to be used in evidence against them (*b*). The transfer book of a bank, which made special reference to the company's contract of copartnery, was allowed to be put in evidence at a trial to prove the price of the bank stock at a certain date, though the contract referred to was not produced (*c*).

Confidentiality.

In an action of damages for libel, brought against two parties, one as publisher and the other as editor and proprietor of a newspaper, the latter denied his connection with the paper in any way. A witness objected to produce the books of the paper, alleging that he was sole proprietor, and that an examination of the books would disclose his private affairs. He was ordained, however, to produce them for inspection by the commissioner, that such excerpts as were necessary might be taken therefrom (*d*). In an action of damages against the directors of a bank, on the ground of fraud, when the bank had been amalgamated with another, it was held that the manager was not entitled to withhold production of the books of the amalgamated banks, on the ground that it might prove injurious to the interests of the customers (*e*).

Miscellaneous cases.

Miscellaneous.—In an action by an individual against a company for executing orders intended for the individual, it was held incompetent to put in evidence a letter written by the defender ten years before, acknowledging a similar offence against a company of which the pursuer was then a partner (*f*). See a case where the judicial examination of partners was allowed before answer (*g*); and the

(*a*) *Great Northern Railway Co.* v. *Inglis*, 1850, 12 D. 1194; H. of L. 1852, aff. 1 Macq. 112, 24 Jur. 434.

(*b*) *Thom* v. *North British Bank*, 1850, 13 D. 134.

(*c*) Same case.

(*d*) *Cadell* v. *Paul*, 1799, aff. 4 Pat. App. 89.

(*e*) *Dobbie* v. *Johnston, etc.*, 1860, 22 D. 1113.

(*f*) *Dickson and Sons* v. *Dickson and Co.*, 1830, 5 Mur. 223.

(*g*) *Wilson* v. *Beveridge*, 1831, 9 S. 485.

cases under noted as to oath of reference to managers and partners (*a*); as to evidence as to powers of a company's manager (*b*); as to delivery of deed of conveyance by the company to one of its partners (*c*); and as to whether a bill had been indorsed by a company *per procurationem* (*d*).

(*a*) *Gow* v. *Macdonald*, 1827, 5 S. 445; *Stewart and Co.* v. *Telfer and Co.*, 1821, 1 S. 103; *Ridpath* v. *Forth Marine Insurance Co.*, 1844, 6 D. 1438; *MacNab* v. *Lockhart and Hendry*, 1843, 5 D. 1014; *Neil and Co.* v. *Campbell and Hopkirk*, 1849, 11 D. 979; *Clelland* v. *M'Lellan*, 1851, 13 D. 504.

(*b*) *Gye and Co.* v. *Hallam*, 1832, 10 S. 512, 12 S. 311, 1 S. and M'L. 753, 14 S. 199, 15 S. 950.

(*c*) *M'Creath* v. *Borland*, 1860, 22 D. 1551.

(*d*) *Davison* v. *Robertson*, 1815, 3 Dow 218.